The International Criminal Court and its Potential to Prevent Human Rights Violations

With Special Consideration to the Actual African Situation

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Cape Town, 15 February 2014 ……..

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Introduction

More than one decade after the International Criminal Court (ICC or the Court) started work and after the first Review Conference of the Rome Statute held in Kampala in 2010, the activities of the Court, its achievements, its general future and necessary changings remain controversial. With the introduction of the Rome Statute the international community installed the first permanent international criminal court in 2002. The ICC followed the ad-hoc tribunals in Nuremberg and Tokyo after World War II established in 1945, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) installed in 1994 and various so-called hybrid tribunals such as the Special Panels of the Dili District Court for the situation in East Timor in 2000 and the Special Court for Sierra Leone in 2002. Furthermore, although the ICC is based on a treaty and therefore generally only applicable to the states that have signed and ratified the Rome Statute, under certain circumstances universal jurisdiction is already possible today even if many countries, such as the People's Republic of China (China), the Russian Federation (Russia), the Republic of India (India) or the United States of America (USA) have not ratified the statute by now. The expectations on the ICC with regard to preventing the worst crimes like war crimes, crimes against humanity and genocide were and are still very high. Beside other goals, like '*to end impunity*, *to achieve justice for all*, *to remedy the deficiencies of ad hoc tribunal*, *to take over when national criminal justice institutions are unwilling or unable to act'*, the focus of the ICC and the Rome Statute is mainly directed '*to help end conflicts* and *to deter future war criminals'* and, in this way, avoid further violations of fundamental human rights.[1]

Africa in general, its countries, its conflicts and its people have always been a 'hot spot' in the context of unbelievable and horrible human rights violations, which have received a lot of international attention. Although human rights violations occur around the world and even in the so called 'Western World', Africa has always been a paragon of such massive human rights infringements. The ICC, as one more pillar in the worldwide human rights protection system, was designed as a further step to prevent widespread human rights violations. On the other hand, recent developments

[1] *United Nations*, Overview of the Rome Statute of the International Criminal Court.

in Africa suggest that the opposition against the ICC is increasing constantly and has reached a new height now, since the African Union (AU) has seriously discussed a possible 'en masse withdrawal' of its members from the Rome Statute during the 2013 summit of the AU in Addis Ababa. This view has been confirmed in subsequent AU meetings. The general opinion of the Court among the African countries has shifted from strong support during the establishment of the ICC to calls of non-cooperation combined with strong allegations that the ICC is targeting African countries and the African race exclusively. Because of these developments the future of the ICC in Africa and even in general seems now reached crossroads.

This work looks exclusively at future-oriented elements of the purposes of criminal punishment. It examines in particular the impact of the ICC on human rights, especially on the African continent. The main problem in this context is, to define clearly such a possible positive impact on the human right situation and to establish proof of it. In the absence of a proof of such a positive impact in the past, the present or the foreseeable future, the justifying of the ICC from an African perspective or in general is in question. To address these main questions, the following sub-questions are asked.

Firstly, the general questions about the justification of international criminal law could arise at least in two ways. On the one hand, it could be asked whether international criminal punishment can generally be justified if it has no proven impact on preventing crimes or massive human rights violations in future. This seems to be a reasonable question, because most modern systems of criminal punishment require, despite the more backwards-looking elements such as retribution or achieving justice, at least an additional impact on the future. Beyond that, even if we assume that such a positive impact on human rights is generally not mandatory for justifying the work of the ICC, for instance with the argument that the state parties transferred their sovereign right to punish to an international institution and that the Rome Statute does not require a cumulative achievement of all grounding purposes, one must still consider those cases where the ICC has no treaty-based jurisdiction but rather a jurisdiction because of a referral of the United Nations Security Council (UN Security Council). These cases, for instance, lack a transfer of

the right to punishment from a sovereign state to an international tribunal and the jurisdiction of the ICC becomes established only because of the unilateral act of the UN Security Council. According to Article 41 of the Charter of the United Nations (UN Charter) the UN Security Council can undertake measures to '*maintain or restore international peace and security*', which includes the possibility to refer a situation to the ICC, even if the Court has no treaty-based jurisdiction. This act of referral constitutes the jurisdiction of the ICC, Article 13 (b) Rome Statute. In assuming that the criminal punishment by the ICC has no impact in preventing future human rights violations, it must be asked: Can a referral by the UN Security Council to the ICC be justified to '*maintain or restore international peace and security"*?

Secondly, a lack of empirical data (statistics and researches) with regard to the main question, the ability of the ICC to prevent future human rights violations, could cause another problem. It must be taken into account that the ICC, like international criminal law itself, is a relatively new instrument in the human rights protection system. The Court had to be installed completely new and its jurisdiction concerns very complex, sometimes on-going situations in different cultural environments around the world, which often lead to difficulties in finding reliable facts. Additionally, sometimes strong political influences occur and just practical problems arise such as in the area of co-operation of state parties with the Court. Because of these problems, which arise regularly at an early stage of a new international institution, it can be assumed that there are currently barely empirical data, such as reliable case statistics or case researches, which could prove a positive influence of the ICC on human rights. Therefore a different approach in answering the main question is needed. At first it must be considered the general accepted rules, principles and experiences in the context of purposes and effects of *national* criminal penalty systems. Because of assured empirical facts, such a positive future-orientated impact can generally be assumed in *national* criminal justice systems even the effectiveness of the certain crime-preventing effects in practice is still controversial. However, from this starting point on it has to be asked, whether these principles are applicable to and useful in international criminal jurisdiction to prove the ability of the ICC to combat future human rights violations. At first glance, this may appear obvious and during the establishment of the ICC no official of the UN or of the involved parties left any doubt in this matter. However, it must be mentioned that an international criminal justice system is not mandatory identical with a national

criminal justice regime and that there are instead vast differences. These differences can mainly be found in the types of the relevant crimes, the numbers of affected persons, in the fact that national governments transfer their very own right to criminal punishment to an international institution and that the ICC strongly depends from a support of the state parties to enforce the decisions of the Court. These points indicate that the doctrines and experiences regarding *national* purposes of punishment of criminals can be the point of departure, but that a simply transferal to the international criminal law (ICL) is not self-evident.

Thirdly, one must also consider the opposite side in criminal procedure and especially, the impact of the Court on the human rights of accused persons, such as the right to equality or the right to fair trial, which are protected in most international or regional human rights treaties. This argument rarely receives the high attention it deserves, but it has to be taken into account that this question is directly linked to the effectiveness of the common purposes of criminal punishment. Deterrence or educative effects are also mainly based on the acceptance of such trials or convictions by the affected people. Therefore, it must be asked whether these effects can occur, if the most affected people or communities reject the work of the ICC. For example, at the AU summit 2013, the whole continent unanimously rejected decisions of the Court and called the outcome as biased and unfair. In such a situation, the aimed future-looking effects then could turn in the opposite.

Fourthly, the issue arises whether there must or at least could be an exception in the prosecution of international crimes in the context of Africa. Even if we take for granted that fundamental human rights shall be protected equally in all countries around the world and because of this the human rights must be protected through the enforcement of criminal law in Africa at the same level like everywhere else in the world, it should not be questionable that the situation in Africa in many points is quite different from other parts of the world. These differences spans across history, the actual political and economic situation, the different cultural background, the dimensions of human rights violations and different historical methods of (alternative) conflict resolution. The legal framework of the Rome Statute includes, for instance in Articles 16 or 53 of the Rome Statute, possible exception clauses. It must be determined how far the scope of these clauses can extend and whether such clauses can be used to consider a special African situation.

Lastly, it must be asked, whether the work of the ICC can even become counterproductive in preventing further human rights violations in particular situations. These cases concern above all on-going conflicts, where the ICC is prosecuting persons or issued arrest warrants and in doing so may hinder a near-term political solution of the conflict. This point, usually discussed under the topic 'peace v. justice' can lead to a nearly intractable conflict between the different goals of the ICC, namely between the goals of achieving justice and ending impunity on the one side and the goals to help ending conflicts and prevent future human rights violation on the other side. It must be asked, whether the possibility of preventing the worst human rights violations can outweigh the purpose of ending impunity.

The aim of this study is twofold, each with a special consideration of the African situation and African cases.

Firstly, the study wants to answer the general question on the impact of the ICC on human rights. For this it will be resorted at first, to experiences and doctrines concerning the 'crime preventing effects' in *national* criminal law. In this context, the prior knowledge of the inherent differences between national and international criminal law will require that further clarification be made whether the national experiences can be transferred to international level or not. Additionally, it will be looked for evidences or, at least, indications of such a positive impact taking regard of experiences with international criminal procedures in the past. In both approaches, scientific search for substantial proofs will be undertaken.

Secondly, in taking the relevant shortcomings of ICC into account, the study will determine how these problems in context of human rights protection could be handled and determine possibilities to end the opposition of African countries against the ICC. Will it be possible to find solutions or ways which can increase the ICC's impact on human rights and which are feasible in the sense that implementation through the Court, the prosecutor of the ICC (the Prosecutor), the state parties or the international community is likely to happen?

The significance of the main question regarding the impact of the ICC in preventing future human rights violations lies in a typical principle (phenomenon) in international law: most international rules are treaty based. The norm is that these principles are obligatory for states that have signed and ratified the treaty. Unlike in the national level, there is no single 'authority' capable of establishing such unilateral rules. Therefore, the more problematic points can be found in such a treaty concept the easier it becomes for states to argue against joining such an international agreement, withdraw from, or even to reject to fulfil its obligation under a treaty in practice - possibly because of self-interested reasons and under massive public, diplomatic or international pressure. In the case of the ICC, the problem becomes relevant in an additional context. Unlike traditional or national criminal courts, the ICC does not have its own execution-organs, so that even on the outset of an investigation or a prosecution, it depends on the contribution of the affected states. The more critical points the actors can invoke the more the effectiveness of the work of the ICC can be decreased. If it is possible to show with this study that the mentioned problems do not really exist, it would become more difficult for non-state-parties to refuse signing and ratifying the Rome Statute or for state-parties to refuse cooperation with the ICC in particular situations. In this way, the effectiveness of the ICC in preventing human rights violation could be strengthened.

As was already mentioned above, a resort to empirical evidence as a method of research in answering our main question is not possible - at least not in a direct manner. In this context, it should be borne in mind that the ICC came into force a little bit more than a decade ago. It should be noted that the jurisdiction of the Court concerns crimes or situations which are much more complex than common national criminal law matters. Additionally, there exist general implementation problems in the early days of such an international institution and visible (future-oriented) effects regularly occur with time delay. There are some empirical data concerning the work of the Court till date, such as the number of cases prosecuted by the ICC, the geographical background of the prosecuted persons, the small number of convictions and the enormous costs of the Court. These points were often cited as an argument against the Court, but can generally give no indication concerning the ability of the ICC in preventing human rights violations in the future. Additionally, a resort to only

certain individual cases or examples of the work of the ICC seems critically. The numbers of occurred examples is far too small and other causes for the certain outcome cannot be excluded. Therefore, it seems not possible to deduce generally binding rules or policies in referring only to one or a very few number of cases. Furthermore, it seems generally questionable, whether reliable data will become available in the foreseeable future. As a consequence of the scope of the Rome Statute, only a very limited number of - de facto occurred - cases will become before the ICC. These is according to that which the Court shall have jurisdiction only in a limited number of cases, namely cases of the worst perpetrators (Article 17 (1) (d) Rome Statute) and only if the national justice system is not able or willing to trial them (Article 17 (1) (a) Rome Statute). Reliable empirical evidences, such as statistical data or case studies, regarding the question of how the Court deters possible perpetrators can therefore not be expected in the foreseeable future. Similarly, also a solely resort to certain empirical experiences from former international criminal courts seems in general critical. Also these courts judged only about a fractional part of the de-facto occurred international crimes in past and were additionally established after the time when the prosecuted crimes were committed. However, empirical data together with other sources can possibly be used in an indirect way to answer this main question. Firstly, we have to assume such a 'crime preventing effect' in the *national* criminal law. This supposition is based on the evidence of data and doctrines available for the *national* criminal law. Such a general impact cannot be debunked, even if the effectiveness of the different 'crime preventing effects' is still controversial. Secondly, it must be determined the main differences between the *national* and *international* level. Lastly, it must be clarified whether these determined differences can exclude a transfer of the empirical data and doctrines from the national to the international level or whether they are applicable also in ICL and in the system of the Rome Statute.

To address these questions, a number of varying sources are considered. The sources include: statutes, doctrines about crime preventing effects in *national* criminal law, documents of international organizations (UN), case law concerning international criminal law, papers or opinions of Non-Governmental-Organizations (NGO) and, last but not least, documents or expressed opinions of African countries or their organizations themselves. Two general types of sources have to be distinguished: primary and secondary sources. Firstly, particular attention should be paid to the

primary sources, namely the Rome Statute as the main source for the ICC itself and documents concerning the Rome Statute, as far as they reflect a homogeneous opinion of the state parties (for instance the Kampala Declaration). Whether we can qualify case law of international criminal courts as such a primary source depends on whether we answer this question from a civil or a common law system perspective. However, ultimately it needs no clear decision. Even a position of an international criminal court should only be taken for granted if the court is delivering plausible arguments for its view. Secondly, if a relevant question cannot be answered by reference to these sources or at least not clearly, a resort to secondary sources, such as doctrines, sentiments of scholars, opinion or documents of NGO's and documents or statements of state parties and their politicians can be helpful. Because of the vast number of such documents, it seems important to concentrate on sources which can deliver clear, logical and coherent arguments in answering our question. Additionally, it is important to keep an eye on the background of the author and possible personal interest of him or her. However, because of the already mentioned and necessary participation of the affected states, organisations and individuals, even opinions or actions without any legally based arguments can become relevant in practice, above all, if they will be used by whole regional organizations like the AU. Because of this and the fact that this work is concentrating on the African situation, the resolutions of the AU and related documents or statements are of special importance for this work.

The thesis will be structured as follows, with a special focus on African or Africa-relevant cases. The first Chapter looks at the *national* level of criminal law. It illustrates the general or common future-oriented purposes for criminal punishment in *national* criminal law systems. Subsequently, Chapter II will determine the main relevant differences between the national criminal law and the ICL. It will be concentrated to these differences, which can become a direct relevance for the transferability of the national 'crime preventing effects' to the international level. Chapter III seeks an answer to the question, whether these showed differences generally exclude a transfer of the crime-preventing effects from the national level to the international level of criminal law. Subsequently, Chapter IV addresses special situations that occurred particularly in Africa, which can have additional influence on

the crime preventing effects of the ICC. This concerns in particular the ‘peace v. justice’ discussion, questions of equality in prosecution, the rights of the accused persons, and question whether regional circumstances can be considered under the Rome Statute. Finally, some recommendations to improve the positive influence of the ICC to human rights will be provided.

Chapter I
Common Crime Preventing Effects in *National* Criminal Law

1. Introduction

The aim of this Chapter is to give a brief overview of crime preventing effects in national criminal law, their interaction among themselves, and failures in certain situations. The ICL and particularly the Rome Statute are relatively new instruments, the number of relevant cases that have been investigated and prosecuted is small and credible evidence (statistics or researches) that can be used to answer the question whether the ICC can prevent future human rights violation, remains scant. A reference to a very limited number of certain cases can from the outset delivers no proof for or excludes such an ability of the ICC.[2] As opposed to the ICL, the national criminal law has been in existence for a longer time and it has been used daily around the world. Therefore, in national criminal law a resort to much more empirical sources, concerning the influence of criminal law in preventing crimes in future, is possible. At the national level a large number of statistical researches exist, a large number of scholars developed comprehensive doctrines during the last centuries and even national court decisions have dealt with these problems.[3] So, if sufficient proofs for crime preventing effects in national criminal law can be established and the relevant differences between the national criminal law and the ILC not cogent exclude an application of these effects in ICL,[4] the ability of the ICC in preventing international crimes (or human rights violations) will be difficult to refute.

In national criminal law, a large number (‘*a broad thrust’*)[5] of different theories exist, which try to explain the reasons and purposes of criminal punishment, its effects, or its justification in general.[6] As a rule, these different theories can be classified into retributive theories (expiation / vengeance / denunciation),

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2 This problem will be discussed more deeply within Chapter III. Proponents as well as opponents of a crime preventing ability of the ICC can refer only to a very limited number of cases to support their opinion. *Fletcher*, Basic Concepts of Criminal Law, p. 31 hold the view that it is ‘*nearly impossible*’ to proof a crime reducing ability of criminal law in a particular case.

3 *Jacobs*, pp. 15 ff.; *Lauterwein*, pp. 5 ff.; *Walker / Padfield*, pp. 79 ff.

4 This will be discusses in Chapter II / Chapter III.

5 *Wilson*, p. 54.

6 See for a good overview: *Clarkson/Keating*, pp. 26 ff. (English literature) or *Jacobs*, pp. 15 ff. (German literature).

utilitarianism theories (concerning the consequences of punishment such as deterrence or education) or mixed theories, which combine parts or elements of the two categories.[7] When simplified, it must be said that all of these, at least if seen individually, can be criticized in some ways and, especially, because of the fact that they can fail in cases with exceptional circumstances.[8] This work will only consider the 'future-looking' or 'crime-preventing' effects[9] of criminal punishment to find an answer to the main question, whether the ICC can help to prevent future human rights violations. Within this framework, several generally[10] accepted utilitarianism effects in national criminal law can be found.

2. General and Individual Deterrence

One of the most popular utilitarian effects of punishment is deterrence, which can be subdivided into individual and general deterrence.[11] The individual perpetrator, who was sanctioned under criminal law, shall not commit the same crime once again (individual deterrence).[12] Other persons shall be deterred to commit a similar crime because of their knowledge that a perpetrator was punished and they have to expect similar consequences under criminal law (general deterrence).[13] The main or general reason behind these two concepts is, the general expectation that individuals weighs possible advantages resulting from the intended criminal act with the possible disadvantages of a possible conviction under criminal law for the committed crime.[14] A lot of arguments are being used against these approaches. One of the central arguments against both deterrence concepts is that deterrence cannot work from the

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7 See *Wilson*, pp. 46 ff.

8 The recognition that the strict retributive as well as the strict utilitarian theories have limitations, led to the development of the mixed theories. But even these mixed theories can be criticized widely. See *Wilson*, pp. 57 f.

9 There are used different terms in literature: *Cryer/Friman/Robinson/Wilmshurst*, p. 23 are speaking about *teleological* purposes or *Clarkson/Keating*, p. 26 are speaking about *utilitarian theories*. Within this work the terms of *utilitarian* theories or *utilitarianism* effects will be preferred.

10 The used term 'generally accepted' must be understand strictly in the way that every of these individual effects can have a justification, (at least) in certain situations. There are still strong critics concerning the efficiency of the individual deterrence effects.

11 *Wilson*, p. 54.

12 *Wilson*, ibid.

13 *Wilson*, ibid.

14 *Feuerbach,* pp. 44 f. Even this general approach of a *homo oeconomicus* was widely criticised because of the fact that perpetrators not always weight their behaviour with possible consequences of their conduct and that they instead often act spontaneously, it should not questionable that there are cases or individuals where this point has a crime preventing effect.

outset, if the perpetrator in question fails to weight the potential advantages of the crime against the possible disadvantages of the crime because of autonomous reasons.[15] Individuals may be influenced by actin in the heat of the moment, by acting under the influence of alcohol or drugs or while they are in other temporary states of mind (rages, anger).[16] A statistically proved high reconviction rate of sentenced perpetrators will often be used as an additional argument against effectiveness of a special deterrence.[17] A further point of critic has its origin in 'technical problems' of the most available crime statistics.[18] Even if empirical studies about a recidivism rate of convicted criminals exist, it seems difficult to determine, whether a deterrence effect or autonomous reasons in the person of the perpetrator have prevented recidivism.[19] As a further problem in this context it must be taken into account that a new crime committed by this person was just not detected.[20] Even if these critical points have generally their justification, there is doubtlessly an influence in the way that '*some potential offenders are discouraged from some types of offence by the threat of legal consequences*'.[21]

3. Educative Deterrence

The concept of 'educative deterrence' rest upon the expectation '*that public morality and inhabitation against committing crimes are created and/or preserved by the regular punishment of others*'.[22] The regular application of criminal law can remind the society of relevant valid norms.[23] A lack of prosecution becomes relevant in the context of the education of the public, but also linked directly to the general efficiency of the about mentioned deterrence effects.[24] Similar to the two previously discussed deterrence concepts, the 'educative deterrence' faces the same problems

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15 *Clarkson/Keating*, p. 35.
16 *Robinson / Darlay*, pp. 179 ff.
17 *Clarkson/Keating*, p. 35.
18 *Walker / Padfield*, p. 83.
19 *Walker / Padfield*, ibid.
20 *Walker / Padfield*, ibid.
21 *Walker / Padfield*, p. 97 ff. refer to several 'obvious' cases in the past.
22 *Clarkson/Keating*, p. 43.
23 *Wilson*, p. 54. *Clarkson/Keating*, p. 39 argue that '*Punishment of criminals builds up in the community over a period of time the habit of not breaking the law. It creates unconscious inhibitions against committing crimes and thus serves to educate the public as to the proper distinction between good and bad conduct*'.
24 A lack of criminal prosecution has doubtlessly a strong influence to the perpetrators consideration between the possible advantages and disadvantages of committing a crime. The lower the possibility of a prosecution is the lower special or general deterrence effects are.

and critics. Where the individual perpetrator does not weight between advantages and disadvantages of the intended crime, 'educative deterrence' falls to irrelevance.[25] Additionally, the already mentioned 'technical problems' in research exists.[26] On the other hand '*experimental evidences, which strongly suggest*' that such a crime preventing effect exists, can be found '*at least in the case of some types of conduct and some types of people*'.[27] In this context, several cases were mentioned. Firstly, a very pictorial example in Great Britain was described, in referring to the situation of not permitted private usage of company phones by employees.[28] Such a phone usage without permission of the employer constitutes a formal and serious criminal offence under British criminal law. However, the lack of criminal prosecution in practice had led to a lack in public morality in the sense that people have not been educated in accepting the gravity of this criminal offence.[29] Secondly, reference was made to the situation within the military as the '*clearest example*', where the purely regular inculcation of the relevant rules and discipline leads to a '*purely automatic, habitual response*' and to a following of the rules.[30] Lastly, it was referred to experiences in Great Britain in relation with drinking and driving. There is now a substantially wider moral disapproval of such behaviour than it was shortly after drinking and driving became a criminal offence.[31] Even some critical arguments exist, the general potential of this concept in preventing future crimes, at least in cases of some potential offenders, can be not denied.

4. Rehabilitation

The aspect to reform or rehabilitate the individual offender is arguably a further important utilitarianism effect.[32] The idea behind this '*rehabilitative ideal*'[33] is to improve the character of the individual person and because of this further offences should be avoided, even if the person in question could still commit the crime without the fear of a penalty.[34] In contrast to the fear-based deterrence effects, the

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25 *Clarkson/Keating*, p. 43.
26 *Walker/Padfield*, pp. 103 f.
27 *Walker/Padfield*, ibid.
28 *Clarkson/Keating*, p. 39.
29 Ibid.
30 *Andenaes*, p. 179.
31 *Bottoms*, Morality, p. 25.
32 *Wilson*, p. 54.
33 *Bottoms*, The Coming Crisis, p. 1.
34 *Walker*, p. 393.

goal of preventing future crimes shall be reached here by a positive motivation of the individual.[35] The efficiency of this (relatively new)[36] approach was widely criticised. These critics were based mainly on the fact that researches have showed '*with a few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism*'.[37] On the other hand, it can be argued that there were researches concentrating on treatment strategies and concerning specific categories of offenders, which revealed a positive influence of such measures.[38] In answering the question whether the rehabilitation or reformation approach can prevent future crimes, three points are of a special importance. Firstly, even the most ardent critics of this approach do not completely deny such an influence. Instead, they recognize that there are '*a few and isolated exceptions'*.[39] Secondly, it must be taken into account that the efficiency of this approach in national criminal law systems depends mainly from the particular penal system itself, above all from the additional (non-penal) undertaken measures. Even today the most national criminal law systems favour other goals of criminal punishment, such as deterrence or incapacitation, or they lack just of (non-penal) recourses in their common prison systems to support the rehabilitation approach. Lastly, similar to other considered utilitarianism effects, the success of this approach depends largely on certain circumstances and in particular, on the individual perpetrator.[40] If a certain individual is unwilling to change attitude and behaviour, such efforts are condemned to failure from the beginning. It is not questionable that the rehabilitation concept fails in special situations, like all the other utilitarian approaches. However, it seems not possible to argue that within the rehabilitation approach '*nothing works*',[41] without a consideration of obvious actual shortcomings of rehabilitation recourses in common prison systems or the unwillingness of some criminals. In considering a 'willing' perpetrator together with the supposition that sufficient rehabilitation sources will be provided by a sentencing system, a positive influence of the rehabilitation approach in preventing future crimes is plausible.

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35 *Clarkson/Keating*, p. 48.

36 See for a short historical overview *Clarkson/Keating*, pp. 48 f.

37 *Martinson*, What Works? (1974); *Bottoms*, The coming crisis, p. 1, speaks about '*the collapse of the rehabilitative ideal*'.

38 *Clarkson/Keating*, p. 51.

39 *Martinson*, What Works? (1974).

40 *Clarkson/Keating*, Criminal Law, pp. 50 f.

41 See *Clarkson/Keating*, p. 51 in reference to the question *'What works?'* asked by Martinson, What works? (1974).

5. Incapacitation

The incapacitation effect must be mentioned as a further important utilitarian effect.[42] Simplified, it could be said that this is or at least should be the 'ultimate' tool to prevent future crimes, at least in consideration of the jailed individual offender. A convicted criminal, who is being incapacitated, is normally unable to commit further crimes during the time of his incapacitation. On the other hand, cases in history have shown that even this approach is subject to failure in special situations. Especially, in situations where the convicted and incapacitated offender can resort to a criminal structure and is still able to communicate with it, further crimes can be committed by him or her.[43] Notwithstanding that, the general ability of this approach in preventing future crimes is not questionable and there wasn't argued serious critic about the general effectiveness of this crime preventing effect.

6. Restorative Justice and Condemnation

Finally, it must be considered two utilitarianism effects, which become usually more relevant in the field of ICL. However, elements of restorative justice and condemnation can be found also within the national criminal law.[44] Apart from the goal of providing compensation to the victim by the offender, conflict resolution is a second main goal within the restorative justice concept.[45] In light of this understanding, further criminal behaviour can be prevented.[46] The concept of condemnation is based on the expectation that punishment can be a form of '*moral communication*' that express condemnation, and as a result, strengthen social solidarity to prevent future crimes.[47] Further, the punishment's true function is maintaining social cohesion and consequently, preventing future crimes.[48] This approach shares similarity with the utilitarian approach of 'educative deterrence' and

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[42] *Clarkson/Keating*, p. 43.

[43] In the seventies and eighties of the last century the main leaders of the terror group RAF (Red Army Fraction) were incapacitated in Germany. Even in this case the highest security standards were applied, they were still able to plan and order further terror acts like murders, bomb attacks or kidnappings.

[44] *Schaack/Slye*, pp. 16 ff.; For instance § 46a StGB explicitly recognized restorative elements within the German criminal law. Furthermore, according § 169 GVG court trials in Germany are principally publicly (condemnation).

[45] *Schaack/Slye*, p. 16.

[46] *Schaack/Slye*, ibid.

[47] *Schaack/Slye*, p. 17.

[48] For further information about this approach see: *Cotterrell*, pp. 74 f.

the retributive theory of 'denunciation'. In all three approaches the punishment has a symbolic or expressive function.[49] One example can be found in the 'shaming penalties' which were widely used in history and even today, in places like the USA. In these cases, beside the retributive punishment through denunciation, the symbolic or expressive communication function is being to the fore. Additionally, reference is made to a popular possibility in practice within the German criminal law system. According § 153a StPO, the prosecutor or the court can under certain circumstances – even in the case of a doubtlessly committed crime – stop the prosecution and instead impose certain 'conditions' on the perpetrator. Such a common 'condition' is for instance that the criminal has to pay only money for a certain charitable project or to a NGO. Even in these cases the payable amount of money is usually crucial higher than an expected fine in a common criminal trial, the majority of perpetrators make use of this opportunity. The most probable reason for this seems to be that the perpetrator would like to avoid a public procedure and a public condemnation or just the '*moral communication*'.

7. Conclusion

In conclusion it can be said that several utilitarian effects in national criminal law systems can be found, even when they have shortcomings. All of them can fail in specific situations. Their particular intensity were and is always controversially and depends from a lot of particular circumstances in the special case, such as from the kind of crime, from the individual perpetrator, the general effectiveness of the prosecution and the particular sentencing system. However, three points are of a special importance and worthy to be mentioned explicitly: Firstly, it seems incorrect to consider only certain utilitarianism effects individually. Each one of these effects tends to fail under certain conditions. Therefore, all utilitarianism effects must be considered as a whole system with an interaction between the individual utilitarian effects. It is important to note that where one particular approach falls short of expectation under special conditions, another approach is likely to perform better and more effectively in preventing future crimes. Secondly, criminal law is not the sole or ultimate way in preventing future crimes. Other provisions, such as education or social development, are also important to reduce crimes in future.[50] The criminal law can be only an important pillar to achieve this goal. Lastly, it would be impetuous to think that criminal

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[49] *Clarkson/Keating*, pp. 50 f. argue in this way for the retributive theory of denunciation and the utilitarian theory of educative deterrence.

[50] *Attorney General Justice* (Australia), Crime Prevention through Social Development.

law together with all the other provisions like education and social development could prevent crimes in the future completely. It is important to state that special circumstances may exist where all these measures fall short of recording any success.

Chapter II

Differences between the *National* and the *International* Criminal Justice

1. Introduction

This chapter seeks to determine important differences between national criminal law systems and the ICL. In evaluating the ability of the ICC to prevent future human rights violations, these differences must be sifted out, which can be of a direct relevance to the question, whether the common (national) utilitarian theories of punishment are applicable in ICL and in particular within the system of the Rome Statute. Several such relevant distinctions between the two levels of criminal law exist, in both the normative and the practical sphere.

2. The Different Nature of Relevant Crimes

One of the main differences between the national criminal law and the ICL can be described under the broader term 'different nature of relevant crimes' in the two different levels. For the ICL level, Herbert Jäger shaped the term of 'macro crimes' ("*Makrokriminalität"*), which are characterized as products of an exceptional, serious and dangerous collective violence.[51] Other authors try to describe these crimes as crimes strengthened by states[52] or crimes organized by states,[53] but such definitions seems to narrow.[54] In contrast to the ICL, relevant crimes in national criminal law are not limited to cases of serious and dangerous collective violence. It is within the broader term of different 'nature of relevant crimes' that the following differences have a particular importance.

Firstly, a strong limitation that concerns the subject matter jurisdiction (*ratione materiae*) is established in the concept of the Rome Statute. According to Article 5 (1) of the Rome Statute, the jurisdiction of the ICC '*shall be limited to the most*

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[51] *Jäger*, p. 11. The term 'macro crimes' is not to be confused with the term *macro criminology*; latter one is more a concept to explain the behaviour of perpetrators with their relationships to the direct environment.

[52] *Naucke*, p. 1.

[53] *Neubacher*, pp. 29 f.

[54] If one takes cases into account, where for instance rebel groups fight against a state structure and commit international crimes, there is clearly no state strengthened or state organized behaviour or conduct.

serious crimes of concern to the international community as a whole'. These crimes of concern are; the crime of genocide (Article 6 Rome Statute), crimes against humanity (Article 7 Rome Statute), war crimes (Article 8 Rome Statute), and the crime of aggression (Article 5 (1) (d) Rome Statute).[55] The 'common' crimes found under national criminal law normally punishably, are from the outset not an object of the Rome Statute. Furthermore, according to Article 17 (1) (d) of the Rome Statute cases, which lack of '*sufficient gravity to justify further action by the Court'*, are inadmissible before the ICC. This provision known as the 'gravity threshold' determines a further limitation in this context, that even in situations where anyone of the four core crimes was committed, only cases of the mainly responsible persons and cases with the worst dimensions are admissibly before the Court.[56] This appears as a particularly, important difference. Although, the national criminal law systems permit or require a distinction between the individual contribution to a certain crime, a generally and completely removable from culpability, or at least, from the jurisdiction of a certain court is normally not thinkable in national criminal law systems.

Another important difference relates to the number of potential victims on one side and the number of perpetrators on other side. Large numbers of perpetrators and victims are the rule in ICL. This can be lead to a situation, where nearly all members of a population group can become victims (for instance in the case of genocide) or where nearly all members of a population group can become perpetrators (for instance in the case of apartheid as a crime against humanity under the Rome Statute). In 1994, genocide occurred in Rwanda. A specific group of the Rwandan population called the 'Hutu's', between April and July of 1994, slaughtered between 500.000 and 1.000.000 members of another group of Rwandan population known as the 'Tutsi's'.[57] This number correlated to about 75 percent of whole Tutsi population group.[58] A similar occurrence took place during the World War II in Germany, where nearly the whole Jewish population in Germany was killed or expelled by the German Nazi regime.

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[55] An exercise of jurisdiction over the crime of aggression is at least actually not possible, see Article 5 (2) Rome Statute.

[56] *Schabas*, p. 86.

[57] *Human Rights Watch (Rwanda)*, Leave None to Tell the Story: Genocide in Rwanda, Introduction.

[58] *Human Rights Watch (Rwanda)*, Leave None to Tell the Story: Genocide in Rwanda, Introduction - The Genocide.

Thirdly, pure practical problems arise in ICL, which are not known in national criminal law. On both sides (perpetrators and victims) a large number of persons are usually involved. The conflict situations occur normally in large and rural areas, which were often still controlled by one of the conflict parties. This complexity makes it impossible to regularly consider all documentations and/or hear all witnesses. As a result, it is necessary to regularly consult with secondary sources: reports from NGOs, written statements of witnesses, and documents from local governments. It is also important to note that the borderlines that separate the armed soldier and the terrorists or the police officers and the criminal are blurred.[59] Additionally, the Prosecutor and the ICC are often left with no alternative than to depend on the local investigating authorities or the actual government support. If the actual local administration refuses a support, it becomes difficult to solve the situation solidly. A case in point is the trial of the current Kenyan President Kenyatta. The Prosecutor of Mr. Kenyatta's case recently requested that the ICC delay the proceeding because the key witnesses are either renegading on their willingness to testify or rescinding the validity of their initial testimonies.[60] The Prosecutor cannot force the one witness to testify and he cannot really check because of which reasons the other witness changed his testify. Such within international crimes 'normal' difficulties, are within the national criminal law – at least usually – exceptional. Because of these additional problems, in ICL the pure practical solution of the occurred situations is usually much more difficult than in national criminal law cases.[61]

3. Relationship between the Perpetrator and its Environment

Another distinction when comparing both levels of criminal law lies in the relationship between the perpetrator and his (direct) environment. Unlike the situation at the level of the national criminal law, where the conduct of the

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[59] *Nouwen / Werner*, 962.

[60] *Karimi*, ICC prosecutor: Evidence insufficient to try Kenyan President Uhuru Kenyatta.

[61] Such practical problems in solving a situation of an international conflict always arise and are not limited to the work of an international criminal court. Also other international organisations are facing the same problems. In this context, it can be referred to the invasion in Iraq in 2003 or to the actual conflict in Syria. In the first case only after the invasions of allied troops, it became clear that the 'clear proofs' for the existence of weapons of mass destructions were completely wrong. Much more complicated seems the situation in Syria. Even it seems clear that recently chemical weapons were used in the conflict, there is absolutely no proof which of the conflict parties is accountable for the use of these weapons.

perpetrator is regularly unaccepted by the community, at the level of the ICL the reverse is the case.[62] The particular perpetrator is not forced to commit the crime in secrecy. Instead in case of ICL an individual perpetrator is normally supported forthright by its direct environment. For instance, it will appear impossible, for anyone person to commit massacre, if such person's direct environment classifies such mass murder as serious crime that is banned. In such a case, the environment would normally intervene and halt such ongoing criminal activities. For such serious widespread and ongoing (international) crimes to succeed, it may only require the support or at the least, the acceptance of the environment. Insofar it can be referred once again to the genocide situation in Rwanda in 1994. This was described as '*popular participation*' of almost an entire population, which was a crucial factor in the commitment of such widespread human rights violations.[63] In 100 days, between 500.000 and 1.000.000 Tutsi's were massacred and mostly, with the use of machetes and ordinary firearms.[64] A mass murder of such proportion can only occur, if it receives a wide support or acceptance from a whole population group.

4. The '*ius puniendi issue'* – Criminal Punishment in ICL without a Sovereign?

The next significant difference can be explained under the so called '*ius puniendi issue'* or the general question, '*whether and how punitive power can exist at the supranational level without a sovereign?'*[65] At the international level no real 'sovereign', such as a parliament, a monarch or a ruler, with a unilateral legislative and executive power to punish, exist. Within this broader topic several important normative and practical points must be considered.

Within the normative level significant differences in comparing the national and international level can be found. Firstly, the most important point results from a general principle in international (treaty) law. Principally, only states are bound to certain law (treaty), as in the Rome Statute, which have signed and ratified the

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[62] *Reuss*, pp. 5 ff.; Even in the cases of against the government fighting rebels, an acceptance within the community – at least within the narrower one – cannot be challenged.

[63] *Human Rights Watch*, Leave None to Tell the Story: Genocide in Rwanda, Introduction – Popular Participation.

[64] *Human Rights Watch*, Leave None to Tell the Story: Genocide in Rwanda, Introduction - The Genocide.

[65] *Ambos*, Punishment without a Sovereign?, p. 1. Whereas the author under this topic considers more the theoretical shortcomings of ICL, within this work from this point resulting consequences will be considered.

agreement.[66] This means that individuals or at least a group of individuals (the individual state) can decide whether generally to be governed by the rules of the Rome Statute or not. At the national criminal law level, individuals or groups of individuals usually don't have such a choice. This general possibility of choice leads to a further important difference concerning the permanence of an international ('*supranational*'[67]) criminal jurisdiction. Even if the Rome Statute generally established the first permanent international criminal court, there is still no permanent (international)[68] jurisdiction for all situations occurring in the world.[69] Lastly, a significant difference at the normative level can be found in the role of the UN Security Council, which is of particular relevance in two situations. For the first situation, the ICC gets jurisdiction about special (not treaty-bound) cases only via a referral by the UN Security Council, Article 13 (b) Rome Statute. Whereas in the second situation, the UN Security Council is empowered to halt an on-ongoing (treaty-bound) procedure or trial of the ICC, Article 16 Rome Statute. In both cases a from the normal criminal punishment system different, independent and non-revisable 'power' can establish the jurisdiction of the ICC or can hamper a prosecution or punishment of a perpetrator. However, it must be taken into account that also in national criminal law similar possibilities, to spare an evidentially criminal from punishment, exist. The most common national possibility is perhaps the pardon.[70] Additionally, a wide range of similar opportunities for the criminal court and the prosecutor, where an evidently criminal will not be punished, can be found in all stages of the national criminal law systems.[71] But at least the case of

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[66] This means not that citizens of non-state parties can commit international core crimes on territories of non-state parties without generally facing criminal punishment. There is no doubt that the worst international crimes are punishable under international customary law, see the Nuremberg Charter or the statutes of the international (ad hoc) tribunals.

[67] *Ambos*, Punishment without a Sovereign?, p. 1.

[68] In this context, it must be clarified that even in these cases a permanent jurisdiction exist, however no permanent jurisdiction of an international criminal court. Because of the principle of universal jurisdiction in cases of committed international core crimes, a permanent jurisdiction of national criminal court is even in these cases not in question.

[69] In non-treaty-bound situations a jurisdiction of the ICC can be established only through a referral by the UN Security Council under Chapter VII (Article 13 (b) Rome Statute).

[70] The possibility of a pardon is recognized in the most national criminal systems in the world. Usually monarchs or presidents can give a pardon and their decisions are normally not reversible by a court, see for instance: Germany (Article 60 (2) GG); Russia (Article 89 (c) Constitution R.F.), USA (Article 2, section 2 U.S.-Constitution).

[71] Such possibilities are mostly grounded on practical considerations: Perpetrators, who support the solving of crimes, avoiding new crimes or recompensed their conduct. Therefore they can enjoy 'impunity' under certain conditions, even when they committed a crime evidently. For instance, within the German criminal law several examples can be found: According § 36b (1) StGB the court can desist from punishment completely if the accused person has helped substantially to

Article 13 (b) Rome Statute, that an independent 'power' can establish the jurisdiction of a criminal court, seems uncommon in national criminal law systems.

Furthermore, crucial practical differences are resulting from the absence of a real 'sovereign'. The system of the ICC lacks in general, its own executive power and always depends from the cooperation of its state parties or other international institutions in enforcing its decisions.[72] The ICC itself has neither the recourses to force an accused person to stand trial before the Court or to enforce a prison term on a convicted person.[73] Whereas at the national level, criminal courts are usually empower with such a direct executive power to enforce their decisions. At the international level the ICC is cogent depending on the cooperation of the state parties. Additionally, the preamble of the Rome Statute state that '*nothing in the statute shall be taken as an authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State*' and therefore also an attempt to arrest an accused individual on the territory of a different state, must general considered as unlawful. Furthermore, the availability of power and resources can play a major role in other areas of the work of the Court. Although, according to Article 54 of the Rome Statute, the Prosecutor of the ICC has extensive authority in investigating a situation, for a direct or comprehensive investigation the office of the Prosecutor is also cogent depending on the cooperation of the state where the certain situation occurred. In a situation where this state refuses cooperation with the ICC, the Prosecutor is constrained to indirect information. The Court itself is faced with the similar problems in establishing the truth during the trial. Such a lack of (at least direct) executive and investigative power is usually not witnessed on the national level. On the other hand, it must be taken into account that these problems are not cogently excluded in the national criminal law. Of course, national criminal courts normally have the power to execute their decisions within the borders of their country. However, if the accused individual leaved the country for some reasons – and such cases because of the globalization becomes more and more important – the

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solve a serious or to avoid a serious crime. Furthermore, the German criminal law for tax offences determines in § 370 AO the completely impunity of offenders, who later corrects their declarations and pay the evaded taxes. In this case they become completely impunity, even if they have evaded taxes into the millions and there is normally an imprisonment sentence up to 10 years for such a crime.

72 See: Articles 86 ff. Rome Statute.

73 *Schabas*, pp. 169 ff.

national courts then are facing usually the same problem how the ICC.[74] In such cases also the national criminal courts depends on support by institutions of other countries.

5. Usually Outstanding Position of Perpetrators in ICL

The next important difference concerns the concrete position of the perpetrator within a certain state. In contrast to national criminal law the international criminal law 'average' perpetrators prosecuted by the ICC usually have or had outstanding positions in their countries. In the extreme case, the accused person is still a sitting head of a state or another still acting high official within an actual government and therefore has still a high influence to an on-going conflict, both politically and effectively. Even in the normative context, the problem of immunity, generally, must be taken into account.[75] More practice-oriented it should be looked to the possible serious practical consequences. What's happens if a sitting head of a state leaves his position to stand trial before an international criminal court? Would it lead to a destabilization of the state system or of the affected country and would the conflict possibly deteriorate into more crimes and human rights violations? Occurrences within the last decades have shown the (negative) impacts, a displacement of sitting heads of states (even when they were despots, dictators or committed crimes under ICL) can have in practice. The (democratic) developments in Iraq, Libya, or Egypt have not stopped human rights violation.[76] Even the mentioned occurrences were not mainly based on actions under ICL, the same problems probably occur, if the ICC takes actions against sitting heads of states and is able to get hold of them. Such questions and deliberations typically do not arise in national criminal law situations.

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[74] A local exception was determined within the European Union (EU) with the European Arrest Warrant (EAW).

[75] Even some international courts denied a functional immunity of an acting high state official in cases of international core crimes, for instance the Special Court for Sierra Leone (Appeal Chamber) in *Prosecutor v. Charles Taylor*, 31. May 2004, par. 43 ff.) and Article 27 Rome Statute determines generally the irrelevance of an official capacity of an accused person, there are still doubts concerning this point. The International Court of Justice determined in *Democratic Republic of Congo v. Belgium*, 14. February 2002, par. 58 ff. that exceptions can still exist, for instance when a jurisdiction of the ICC is questionable in a special case. See also *African Union*, Decision on Africa's Relationship with the International Criminal Court (October 2013), which '*REAFFIRMS the principles deriving from national laws and international customary law by which sitting Heads of State and other senior state officials are granted immunities during their tenure of office'*.

[76] See for instance: *Amnesty International*, Annual Report's 2013 on the situations in Egypt, Iraq and Libya.

6. The ICC's Principle of Complementary

The principle of complementary statutes a further significant difference comparing to national criminal law. According to the Preamble of the Rome Statute, the Court shall be complementary to national criminal jurisdiction. Article 20 Rome Statute takes up the common *ne bis in idem* principle. Article 20 (3) Rome Statute determines special rules concerning the complementary system within the Rome Statute. Accordingly, the ICC finally can decide whether the steps and efforts of the affected national prosecution system were sufficient or not. Therefore cases are thinkable, where all at national level, conceivably involved persons (prosecutor, defence, court and victim), arrive at the conclusion that there are not enough evidences for a crime committed by the perpetrator. Even in such a case the ICC could 'overrule' the (consensual) national view in arguing that the prosecution was not sufficient. Such a solution is unfamiliar within the national criminal law level and is also not used in the system of the international ad-hoc courts.[77]

7. Formal Conflict between National and ICL?

Arguably, another distinction may be found in the possibility of a conflict between national and international criminal law, resulting from the applicability of formal international criminal law beside formal national criminal law.[78] As a result, a possible perpetrator could become a special 'normative conflict'.[79] In a case where a formal national criminal law allows a certain behaviour, which is prohibited under international criminal law, the perpetrator can face a special conflict situation, which is nearly impossible in a pure national criminal law situation.[80] Even when such a situation is generally thinkable, the scope of application seems quite minor. At least, in the cases of genocide and war crimes, such a normative conflict is from the outset excluded.

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[77] See Article 9 (2) ICTYSt ('*The International Court shall have primacy over national courts.'*) or Article 8 (2) ICTRSt ('*The International Tribunal for Rwanda shall have the primacy over national courts of all States.'*).

[78] *Reuss*, p. 5.

[79] *Reuss*, pp. 7 ff.

[80] *Reuss*, ibid. He is referring for instance to the situation in Guantanamo, where American soldiers following orders (arguably) fully covered by US law, but possibly infringe international criminal law, namely fulfil crimes against humanity, Article 7 Rome Statute.

8. Conclusion

In conclusion several important differences exist between the criminal law on a national level and the criminal law established by the Rome Statute. These differences mainly lie in the nature of relevant crimes (‘normal’ crimes v. ‘macro crimes’), the relationship between the perpetrator and his or her environment (condemnation by the environment v. support by the environment), the lack of a sovereign in ICL (the national courts power to force their decisions v. increased voluntary participation necessary in the case of the ICC), and the position or influence of the perpetrator (usually no power to hinder a prosecution v. usually outstanding position and high influence). These findings show that a simple and unquestioned transfer of the common purposes of criminal punishment from the national to the supranational level seems critically. Instead, it seems necessary to take these differences into account and ask for every particular utilitarianism effect, whether it has a general justification under the Rome Statute.

Chapter III
Transfer of the Common Utilitarian Effects to the ICL

1. Introduction

This chapter seeks to build on the outcomes of the last two chapters and answer the main questions whether the common utilitarian effects in national criminal law are applicable similarly in the case of the Rome Statute and whether the ICC has in general the ability to prevent human rights violations in future. Some decisions of international criminal courts and several international criminal law scholars take the general view that there are no cogent reasons for a distinction between the (utilitarian) purposes of punishment in national and international level and that it is possible to transfer them from the national to the international level without any exceptions.[81] However, more and more doubts have arisen, mainly grounded on the important differences between the national and the supranational level.[82] Two important general points must be clarified before providing the answer to these main questions.

Firstly, this Chapter does not try to determine a certain degree of the different utilitarianism effects in ICL, especially under the system of the Rome Statute.[83] To answer our main question this seems also not necessary. Instead, it will be sufficient to demonstrate that these effects are not cogently and completely excluded, or rare ineffective in the case of the ICC.

Secondly, experiences concerning international criminal courts and the ICC in the past are only of limited suitability to prove or deny a positive influence of the ICC to human rights. In this context, it was for instance, argued that the Moscow Declaration[84] of 1943 during the on-going World War II and the installation of the ICTY during the on-going conflict in the former Yugoslavia were unable to deter the

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81 *Prosecutor v. Kupreskic*, ICTY (Trial Chamber), 14. January 2000, par. 848; *Werle*, p. 30 ff.

82 *Reuss*, p. 3. speaks about an '*obviously to optimistic view*'.

83 This seems also not possible. Even in national criminal law – how showed - the certain degree of the different utilitarianism effects is still controversial. Taking this into account, how should it be possible to determine a certain degree of these effects in the relatively new ICL?

84 The Moscow Declaration, which was issued about one and a half years before the end of World War II, determined the liability of Nazi leaders under international criminal law for during the war committed crimes. It was the basis for the London Charter as the grounding document for the Nuremberg Trials after World War II.

perpetrators.[85] Such an (isolated) resort seems critical. These international actions were quite limited in their quantity, and concerned only a fraction part of the de-facto occurred international crimes in past. Furthermore, even if it is clear that these mentioned measures had no influence on the general situations, it cannot be said in absolute terms that there was no positive influence in certain situations or on certain involved individuals. Similar problems must be considered within an argumentation on the other side. For instance, during the Review Conference of the Rome Statute, it was argued that certain cases show that the work of the ICC and even the announcement of possibly measures had positive influence on human rights.[86] In this context, a few cases were mentioned, such as the situation in Côte d'Ivoire in 2004, the situation in Georgia in 2008, and the criminal trial against Thomas Lubanga (the latter one had reportedly, led to the release of 3000 child soldiers in Nepal).[87] In all these cases, a strong temporal connection exists between measures of the Court and following positive reaction of involved leaders. However, this strong temporal connection can establish an indication, but no evidence or general rule. To use these cases as cogent evidences, the exclusion of other reasons for the mentioned (positive) behaviour of involved leaders would be necessary. To establish a general rule in referring to these cases, an essentially larger number of cases or references must be required. As a consequence of these shortcomings, the ability of the ICC to prevent future human rights violations can be proved only, when it can be demonstrated that the common utilitarianism affects in national criminal law can be transferred generally straight to the international level.

2. General Deterrence by the ICC

This section address the 'general deterrence' effect, namely whether the ICL under the Rome Statute can deter other persons from committing similar international crimes. In this context, an extensive clash of opinions exists. These diverse opinions range from, the existence of only a '*marginal*' deterrent impact[88] to that the existence

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85 *Reuss*, p. 3.
86 *Mendez*, para. 17 ff.
87 *Mendez*, para. 18 ff.
88 *Ku/Nzelibe*, p. 832; *Reuss*, pp. 7 f.

of the ICC can deter perpetrators extensively, and even pre-trial actions of the Court before starting or during an early stage of a conflict can deter potential perpetrators.[89]

In answering this question, particularly two aforementioned key distinctions between the national and international level are relevant, namely the 'lack of a sovereign' and the 'outstanding position of perpetrators.'

a) Lack of a Sovereign

The most important influential points or differences can be found clearly under the generic term of 'lack of a sovereign' comparable with the national level. As previously mentioned, both the special and the general deterrence effect are primarily based on the expectation that an individual weighs possible advantages in the intended crime with the disadvantages of a possible conviction under the criminal law system.[90] The more possibilities an individual has to avoid a prosecution, a conviction or just the practical execution of decisions of the ICC, the lower the deterrence effect will be. In this context it must be looked upon, especially on the following points at the normative and practical level.

Firstly, some of the most powerful and most populated countries in the world, like China, India, Russia, or the USA are not state parties of the Rome Statute. This shows a general normative (deterrence) 'dilemma' in in the case of the Rome Statute - the general need of signing and ratifying the international agreement. The Court has usually no jurisdiction for international crimes committed by individuals of non-state parties on the territory of a non-state-party. In these cases, only via a special referring of the UN Security Council, a jurisdiction can be established.[91] This requirement implies that actually, the majority of the world population has a fundamentally lower risk in being prosecuted by the ICC in the case of committing international crimes. For individuals belonging to this majority, the deterrence effect is obviously reduced. On the other hand, political developments in connection with the installation of the ICC show that even in these cases a general deterrence effect cannot be denied

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89 *Mendez*, par. 17 ff.; *Olasolo*, p. 13.

90 *Feuerbach*, pp. 44 f. It will not be considered these criminals, who act not in such a rational manner. In both levels of criminal law these concept is failing in general in cases of certain individuals. Both the individual who is acting in the head of the moment in national criminal law and a rebel leader who is just fighting to stay alive will be not deterred from possible consequences under a criminal law system. Insofar there is no difference between the two levels of criminal law.

91 See Articles 12 (2), 13 (b) Rome Statute.

completely. Otherwise, it would unexplainable why the USA, as one of the most powerful countries in the world is trying to avoid in general, the prosecutions of their own nationals before the ICC through national legislatively measures, the interference of the UN Security Council or diplomatic channels. To prevent possible prosecutions from the outset, the USA in particular enacted the national American Service Member Protection Act (ASPA),[92] used its veto power within the UCSC[93] and agreed non-extradition arrangements with a large number of other countries.[94] When even the USA that wields enormous power and influences, and is without direct treaty-obligations seems to be forced to take such comprehensive measures in avoiding a (theoretical) prosecution of their nationals, one point becomes clear. Today no individual person, no matter of a treaty-based jurisdiction of the ICC and how powerful protectors of this individual person are, can be absolutely sure, to avoid a prosecution or conviction by the ICC.

Secondly, the ICC lacks in general its own (practical) executive power, which could become relevant in the context of the 'general deterrence effect'. When a criminal justice system is unable to fulfil its function in practice and especially, unable to enforce its decision, for a criminal person the risk of punishment is evidently, lower. So, if an accused individual finds a 'safe haven', be it at the territory of his own state or at the territory of a non-state party, the possibilities of the Court effectively performing its duty are weakened. This weakness can lead to a direct (negative or decreasing) impact on the deterrence effect.[95] Reference can be made to the case of Omar Al-Bashir in Sudan and that of Joseph Kony in Uganda. Although, the ICC issued arrest warrants against these persons, the Prosecutor was until now unable to enforce these decisions.[96] On the other hand, the following points have to be taken

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92 The ASPA (enacted 2. August 2002) and its amendments are containing several provisions, e.g. a prohibition for US authorities to cooperate with the ICC (sec. 2004 ASPA) or the possibility to measures to free US citizens in custody of the ICC (sec. 2008 ASPA).

93 In 2002 the USA tried to use its UN Security Council veto to block a renewal of the mandates of several UN peacekeeping missions, unless the UN Security Council agreed to permanently exempt U.S. citizens from jurisdiction of the ICC. Even this attempt failed, the USA could reach temporarily exemption through the *UN Security Council,* Resolution S/RES/1422 (2002) and a renewal for one more year with the *UN Security Council,* Resolution S/RES/1487 (2003). These decisions were based of the provision of Article 16 Rome Statute.

94 According Article 98 (2) Rome Statute '*the Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international agreements'*. Such agreements pursue the purpose that accused US nationals cannot be extradited to the ICC, while they are staying on the territory of a state party.

95 For instance *Reuss*, p. 9.

96 *Mendez*, para. 23.

into account in this context. Firstly, it must be expected that at least, state-parties of the Rome Statute fulfil their obligations under the ICC. Secondly, it is not uncommon that even countries, which are not state parties, effectuate decisions of the Court or at least cooperate with the ICC.[97] Therefore, a perpetrator can become very limited in his territorial radius of action.[98] Additionally, a perpetrator can never have an absolute security, that it is possible to find such an opportunity after committing international crimes, or that such a possible opportunity is not only a temporal solution. Reference can be made to the former president of Liberia, Charles Taylor, who got political asylum in Nigeria 2003, but subsequently was arrested and extradited to stand trial before the Special Court of Sierra Leone in 2006.[99] Because of these points, the ICC's lack of practical executive power no longer can establish a guarantee for impunity.

b) Outstanding Position of the Perpetrator

Furthermore, the often outstanding position of perpetrators could have an influence on the deterrence effect in different ways. Political connections or influence could help avoid a prosecution before an international criminal court. Within the normative system of the Rome Statute, this can take place via the interventions of the UN Security Council according Article 16 of the Rome Statute in the case of treaty-base applicability of the Rome Statute or just trough inaction of the UN Security Council in the case of no treaty-based applicability of the Rome Statute, Article 13 (b) Rome Statute. Furthermore, a pure practical solution must be taken into account - the granting of asylum or exile by a third state.[100] Above all, the latter alternative can become even more relevant in the cases of on-going conflicts where the suspect is still in power. The international community in these cases normally have, at least in practical, no problem in providing a 'safe haven' in exchange for an end to a conflict.[101] Also these points could lower the deterrence effect. On the other hand,

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[97] *Mendez*, para. 7; *U.S. Department of State*, Daily Press Briefing, 20. September 2013. Within the press briefing the spokesperson mentioned explicitly the arrest warrant of the ICC against the Sudanese president Al-Bashir, as a point of consideration in the context of Omar Al-Bashir's application to attend the meeting of the UN General Assembly in New York.

[98] *Mendez*, para. 23 is explicitly refereeing to the case of Al-Bashir in Sudan.

[99] *Rahmsdorf*, Diktatoren im Exil – verbannt in den goldenen Käfig, 15 February 2011.

[100] Within the international community such measures have a long tradition and are even today widely practiced, see for an overview of cases in the past Chapter IV, pp. 42 ff.

[101] See e.g. in the case of Qaddafi (Libya) *New York Times*, U.S. and Allies Seek a Refuge for Qaddafi, 16 April 2011, in the case of Saleh (Yemen) *U.S. Department of State*, Press conference, 26

the already mentioned argument – that there is no absolutely security for a perpetrator - must be taken into account. Also a head of state or a high state official cannot be sure that the UN Security Council will stop a prosecution before the ICC respectively will not establish a jurisdiction of the ICC via a referral to the ICC according to Article 13 (b) of the Rome Statute. In addition, the mentioned possibility of granting asylum by a third state can fail because of several reasons. Beside just practical problems within the implementation of such a decision,[102] the international community normally loose interest in finding such a solution, if the individual loosed its power before such an 'agreement' could be reached.

In conclusion, the 'general deterrence effect' of the ICC can be lower than in national criminal law. The main reasons for this decrease are not lying in the system of the ICC itself. Instead, they lie often in political considerations, decisions, or practical issues in special cases, which can lead to a decreasing of the 'general deterrence effect'. However, today no offender – no matter what position the offender is or whether treaty-based jurisdiction of the ICC is in existence or not – has a guarantee that he or she can escape.

3. Special deterrence

A further point to consider is the 'special deterrence effect', which means, the individual perpetrator, who was sanctioned under criminal law, shall not repeat the crime.[103] Two points under the topic 'nature of crimes', mentioned above are of special importance in this context. In the case of a conviction by the ICC, a sentence of many years of imprisonment will follow. According to Article 77 (1) Rome Statute, a specified number of years of imprisonment or life imprisonment are stipulated. Other sentences are only '*additional'* options for the Court, Article 77 (2) Rome Statute. If one additionally takes into consideration that the relevant crimes normally required a structural support, it seems that there is often no (more) special deterrence for the individual convicted person necessary. Therefore, it could be

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January 2012 or in the case of Assad (Syria) the British Prime Minister *David Cameron* in an Interview with TV Al Arabia, 06 November 2012.

[102] There are actually two cases to which in this context can be referred: Julian Assange in the embassy of Ecuador in London and Edward Snowden in the Russian Federation. Even both were granted asylum in Ecuador respectively in Venezuela, they are just practically not able to travel to these countries.

[103] *Wilson*, p. 54.

argued that there will be in general, a very low practical possibility for a convicted perpetrator to repeat earlier committed international crimes, after being released from prison.[104] This view however, remains too narrow. It is not only the conviction itself that can deter from repeating an earlier committed crime. Also, the readiness to initiate investigations by the Prosecutor or the launch of a trial before the Court can have this effect.[105] In this situation, the certain individual, who may still be in power at time of the investigation, can clearly see that a criminal behaviour will be not tolerated. Reference can be made to the situations in Kenya during the elections in 2007 and 2013. After widespread violence and massive human rights violation during and after the election 2007, several high Kenyan politicians, among them the actual president Kenyatta, were prosecuted before the ICC in 2011 for their role in the conflict. During the following election in 2013 the again expected violence did not occur.[106] It shows that an 'individual deterrence' is not from the outset excluded under the system of the Rome Statute, even if this example is no cogent evidence for a positive influence of the ICC to human rights.

4. Educative deterrence

This utilitarianism effect received probably the least critics in international criminal law. Even opponents, who challenged other effects, such as the individual or general deterrence effect, strongly recognized the importance of this element in international criminal law.[107] This is not surprising. If substantive criminal law will not be applied over a longer period of time, individuals will no longer interpret the criminal behaviour as 'wrong'.[108] In both levels the situation is after the (permanent) installation of the ICC quite similar and none of the showed differences between the national and international criminal law has a cogent or fundamental influence on this utilitarianism element. The 'lack of a sovereign' and in particular, the fact that some situations (where no treaty-bound jurisdiction of the ICC exists) remain irregularly being prosecuted before international courts, is insufficient argument against effectiveness of the 'educative deterrence' under the Rome Statute. As a result of the general treaty concept of the Rome Statute, only the individuals and situations under

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[104] *Reuss*, p. 5.
[105] *Olasolo*, p. 13
[106] *Kimenyi*, Kenya: A Country Redeemed after a Peaceful Election, 02 April 2013.
[107] For instance: *Ku/Nzelibe*, p. 787; *Reuss*, pp. 12 f.
[108] *Wilson*, p. 54. *Clarkson/Keating*, p. 39.

the original (treaty-based) jurisdiction of the ICC can be considered. For these individuals, a permanent and consistent jurisdiction, which leads to a consistent education, should not be in question.[109]

5. Reforming Element

Furthermore, it must be asked whether the 'reforming element' can play a role in the Rome Statute. Two mentioned differences under the topics of 'nature of crimes' and 'relationship between the perpetrator and its environment' could disbar this element in general in ICL. Firstly, after a long imprisonment of a convicted perpetrator, it seems unlikely that he will get the necessary support to repeat earlier committed international crimes. Because of this, it could be argued that it makes from the outset no sense to reform a person convicted by the ICC. However, like in the context of the 'special deterrence' such a possibility is not completely excluded. It is not only the conviction itself, which can illustrate an individual person his or her wrongdoing and in this way reform the person in question. Even investigations by the Prosecutor or the launch of a trial before the ICC can lead to such a reformation. Secondly, it is important to look at the 'relationship between perpetrators and their environment'. It was argued that a re-socialization or a reintegration is generally not necessary in ICL, because perpetrators are usually well integrated in society at the time of committing the crimes.[110] References were made to the cases of former Nazi leaders in Germany or to the case of Radovan Karadžić in former Yugoslavia, who lived as normal and unobtrusive members of the society in the post-conflict period.[111] However, this view remains to narrow. It may be that the perpetrators are well integrated in their closer environment during and after the conflict situation – however, there was and is precisely no integration in the value system of the international community. In this context a re-socialization or a reintegration seems still necessary or at least, not from the outset excluded.

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[109] Additional, even if we have no 'permanent jurisdiction' of an international court for the non-treaty-bound situations, solely the permanent existence of the ICC led probably to a crucial improvement concerning these situations. It seems quite questionable whether the UN Security Council would have installed an ad-hoc tribunal in the cases of Omar Al-Bashir and Muammar Al-Gaddafi, which the council referred to the ICC and in this way established the jurisdiction of the Court.

[110] *Reuss*, pp. 9 f.

[111] *Reuss*, p. 9.

6. Incapacitation effect

Furthermore, we have to look to the 'incapacitation effect' within the system of the Rome Statute. When considering the individual perpetrator, on the first view, it seems absolutely clear that a jailed criminal should be not able to commit further crimes, particularly, when the prison is in The Hague and usually thousands of kilometres from the place of conflict. On the other hand, the different 'nature of crimes' must be considered in this context with a special attention. If it is recalled that this effect can be failed even in national criminal law if the incapacitated individual can resort to a criminal structure[112] and one considers additionally, that international crimes are characterized as products of an exceptionally serious and dangerous *collective* violence and main perpetrators are usually able to resort to a comprehensive structure.[113] Then the question could be asked whether this possible resort can have a negative influence on the 'incapacitation effect' within the system of the Rome Statute. Reference can be made here to two cases in Germany, in which the organisation or the collective element played an important role. The first one concerns an actually on-going case before a German criminal court, which is applying the (national) Code of Crimes against International Law (Völkerstrafgesetzbuch), the first time since its date of entry in 2002. Two original born Rwandans are accused of having committed crimes against humanity and war crimes in their capacities as President and Vice President of the rebel organisation Forces Démocratiques de Libération du Rwanda (FDLR) in Rwanda and in the Democratic Republic of Congo, respectively. One of the most important points within this case is that they arguably committed the most of the criminal acts, while they were physically in Germany in introducing their forces by SMS, Email or by telephone. This shows that within the modern world, with its modern communication tools, physical presence at the crime scene is not compulsory necessary. Of course, a higher monitoring can be expected, while a convicted criminal is in prison. However, even during an imprisonment such cases cannot cogent excluded, when the perpetrator can resort to a comprehensive structure. A picturesque example for this is the second mentioned German case. In the seventies and eighties of the last century

[112] See Chapter I, pp. 13 f.
[113] *Jäger*, p. 11.

the main leaders of the terror group Rote Armee Fraktion (RAF)[114] were incapacitated in Germany. Although, in this case the highest security standards were applied, they were still able to plan and order further terror acts like murders, bomb attacks, or kidnappings. However, even if there are cases thinkable, where an incapacitation cannot prevent the committing of future international crimes, such a constellation cannot be considered as the normal case. In conclusion, the mentioned differences cannot lead to exclusion or a fundamental decrease of this utilitarian effect under the Rome Statute. In this context, the situations in national criminal law and under the Rome Statute are similar. If the convicted and imprisoned persons in both levels can revert to still powerful structures outside the prison, they are still able to commit (indirect) further crimes. However, the general ability of this utilitarian effect under the Rome statute in preventing future human rights violations is not in question.

7. Restorative Justice and Condemnation

At this point, the two last utilitarianism effects – restorative justice and condemnation - must be looked at. It can be not questioned that these two aspects generally have the ability to support the solving of complex conflict situations and by this, capable to prevent violent conflicts in the future.[115] When compared to the national criminal law level, such a solution in international conflict situations will be probably much more complex, difficult, and the concrete outcome after such a process will be at the beginning often unclear or not easy predictable. But none of the highlighted key differences between the national criminal law and the system of the Rome statute can exclude these utilitarianism effects completely. Instead, because of the complexity and dimension of such conflict situations there will likely by no other alternative (practical) possibility, at least in an overall context.[116] Reference can be

[114] Rote Armee Fraktion (Red Army Fraction) was a left-wing militant or terror group accountable for several terror acts and killings of high politicians and other leaders in Germany.

[115] These problems are directly linked to the discussion of 'peace v. justice'. It will be discussed deeper in the following chapter.

[116] Because of the usually large number of perpetrators, it must be looked after alternative conflict resolution tools. Of course, it is possible to trial the most responsible persons before the ICC, see also Article 17 (1) (d) Rome Statute. But what should happen with the other participants? Generally the national criminal law have to find a solution for these individuals. But if one takes into account that usually already the aiding and abetting in the case of such capital offences must lead at least to a temporal prison term, the nearly insuperable obstacles become obviously. What is happens if nearly a whole group of a national population will be imprisoned?

made to examples in the past, such as the Truth and Reconciliation Commission in South Africa,[117] the Truth and Reconciliation Commission in Sierra Leone,[118] or the Truth and Reconciliation Commission in Chile.[119] Additionally, the developments in Europe after the World War II, especially the massive improvement in Germany's relationship / friendship to Poland and France, were mainly based on elements of reconciliation. These limited examples cannot establish a cogent proof for the crime preventing ability of these utilitarianism effects in ICL, but they can present, at the minimum, an indication of its effectiveness. In summarising these points, the general justification of these two utilitarian effects within the system of the Rome Statute cannot be challenged.

8. Conclusion

In conclusion, all the common utilitarian effects recognized and proven in national criminal law systems also have a justification within the Rome Statute. Therefore, the ICC generally, possesses the capability to prevent future (international) crimes and human rights violations. There exists no evidence, that one, several or all of the common utilitarianism effects are cogently excluded under the Rome Statute. All the used arguments against such transferability and against a capability of the ICC to prevent future international crimes are not cogent. These criticisms concentrate only on certain individual utilitarian effect and don't consider the whole system, in particular the mentioned interaction between the different utilitarianism effects. In addition, critics usually speak only about '*marginal*' effects[120], an '*extremely low deterrence effect*',[121] or arguing that the common purposes of punishment generally do not '*fit the concept*' of international criminal law.[122]

To confirm the crucial and increasing role of the ICC for the protection of human rights and to react to some more general critics concerning the justification or effectiveness of the ICC from a human right perspective, the following general points (concerning all utilitarian effects) are of a special importance.

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[117] Report *Truth and Reconciliation Commission (South Africa)*.
[118] Report *Truth and Reconciliation Commission (Sierra Leone)*.
[119] Report *Truth and Reconciliation Commission* (Chile).
[120] *Ku/Nzelibe*, p. 832.
[121] *Reuss*, p. 9 ("*denkbar wenig*").
[122] *Ambos*, Impunidad, p. 366 ("passen").

Firstly, it must be taken into account that the ICC obviously has not reached its full capacity as at yet. The ICC is generally a quite new instrument within the international human rights protection system.[123] It was only established a decade ago. Additionally, the concept of the Rome Statute is treaty-based. As a result, it is strongly depending from the participation of the international community. The more countries willing to accept and transfer decisions of the ICC, the higher the probability of a prosecution and therefore, the stronger the deterrence effects will become. The more countries accept in general the rules or principles of the Rome Statute as values of the whole international community, and show in this way that a committal of the worst international crimes will no longer be tolerated, the stronger the educative elements will become. Today, several large and powerful countries are still not state parties of the Rome Statute. Taken these points together, it must lead to the realisation that work still has to be done, that still comprehensive promotional work is necessary, and that the Court will only reach full efficiency and full capacity probably in the future. However, such expectable improvements must be taken into account when evaluating the influence of the ICC on the human rights situation in future.

Secondly, special attention must be paid to the aforementioned interaction of the different utilitarianism effects of criminal law. All of the relevant effects, at least if seen individually, failed in cases with certain circumstances.[124] The deterrence elements must fail from the outset, where a perpetrator is not acting rational. The educative and reforming elements must fail from the outset in the case, where individual persons are not willing to change their attitude and behaviour. As a consequence of these points, it is not possible to consider only certain isolated utilitarian effects. Instead it must be looked to the entirety of these effects.[125] An argumentation in the way that only certain utilitarianism effects are substantially lowered or excluded within the Rome Statute, is not expedient in answering the

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[123] Even the international criminal law itself existing already for a longer time, the first (permanent) written international criminal law and the first permanent international criminal court were first introduced through the Rome Statute.

[124] See for instance *Wilson*, pp. 57 f.

[125] Holding this shortcomings of the individual approaches in mind, the German Constitutional Court ('Bundesverfassungsgericht'), which applying in general a mixed theory ('Vereinigungstheorie'), has ruled in several grounding decisions, that all these well-recognized purposes (including the retributive elements, which were not so important for our work) have to be taken into account and that there is no general priority of one of them, see e.g. *Bundesverfassungsgericht*, 21 June 1977, BVerfGE 45, 187 (210).

question whether the system of the ICC can in general prevent human rights violation in future, if simultaneously other not excluded utilitarianism elements exist. Within the national criminal law nobody would seriously challenge the general ability of criminal law in crime prevention, even if it is clear that also there all the recognized utilitarian effects can fail in special cases.

Thirdly, it seems necessary to clarify the general expectations on the ICC. These expectations seem often too high, which can become sometimes counterproductive. If one promotes the ICC as the ultimate human right protection solution,[126] it becomes easier to argue that the system of the Rome Statute failed, if massive human rights violations arose or were to arise in the future. The concept of the ICC is from the outset only one pillar in the human rights protection system.[127] Even considering solely the field of criminal law, the Rome Statute can only be a part of the protection mechanism. By remembering that the ICC has jurisdiction only for the worst cases and the most responsible persons (Article 17 (1) (d) Rome Statute), it becomes obvious that the ICC's utilitarianism effects are focused mainly or exclusively on these most responsible persons. To hold the followers or supporters (which are for the committing of such international crimes not less essentially) criminal liable, other (criminal law) measures are necessary. For instance, the normative and practical implementation of (customary) ICL into national criminal law is of particular importance. Furthermore, besides the different approaches in criminal law, a wide range of other protection mechanisms exist, which can help to prevent or end human rights violations.[128] The UN Charter itself contains on the supranational level, extensive economic, political, and even military possibilities, for instance Articles 41, 42 UN Charter. Similar measures (with a generally exceptions of military actions) are also possible on a bilateral or regional level. These points show that there is yet no ultimate human rights protection organ in existence. Only the simultaneous application of the wide variety of protection mechanism at international, regional and national level can guarantee an optimal protection of human rights.

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[126] In this way *Bensouda*, Chief Prosecutor of the ICC, on a lecture on 13 April 2012 spokes about '*The Rome Statute establishing the ICC provides a solution: Creating global Governance without a global government*.'

[127] In this context, there is no difference to the national criminal law systems. In both levels it is absolutely clear, that criminal law alone is not able to avoid the committing of crimes in future.

[128] *HREA*, The United Nations Human Rights System.

Fourthly, it must be considered the point of 'political influence' to the work of the Court.[129] Even within the normative level of the Rome Statute, possibilities such as the power of the UN Security council to establish the jurisdiction of the ICC (Article 13 (b) Rome Statute) or to defer an investigation or prosecution (Article 16 Rome Statute), exist. This point is often used as a general argument against the utilitarian effects resulting from the ICC. However, there are at least three reasons, why such a view seems to be incorrect. All state parties of the Rome Statute decided voluntarily to accept such possibilities of a political influence. Furthermore, certain particularly complex or difficult situation in international conflicts can probably only be solved through such possibilities of a political intervention.[130] Lastly, individuals cannot be sure (at least, not absolutely) that such a political intervention will be used in their favour in individual situation. Therefore, these political opportunities seem necessary on the one hand, to react appropriately to certain situations. On the other hand, they not lead to a complete exclusion of utilitarianism effects of the ICC.

Lastly, it must be mentioned the by far most important point in evaluating the (positive) influence of the ICC to human rights. It is necessary to consider in particular, the possible effects in one individual case and ask the following questions. What normally are the consequences, if only one individual leader decides not to commit international crimes because of the existence of the ICC? How many deaths of innocent men, women and children or how much indescribable harm for these potential victims can be prevented, if only one individual leader, with high political and actual influence, surrenders his or her intention or plans because of the existence of the ICC? This could lead to the prevention of indescribable harm or death of thousands or even many more people. Even if just one out of hundreds of potential perpetrators can be deterred, reformed or educated by the existence of the ICC, then the influence of the Rome Statute to the human right situation becomes enormous. Therefore, it seems in general, critical to argue that some (isolated) utilitarianism effects can only have a marginal or nominal importance in the context of the Rome Statute.

In summary of these five points, it follows that the ICC – as measured by the general capabilities, the many-faceted general difficulties in finding a 'one world solution',

[129] I will come back to this point within Chapter IV.
[130] See the peace v. justice discussion, Chapter VI.

and the general difficulties in negotiations concerning such new international institution that affects the sovereignty of national states – is already playing today, an important role within the global human right protection system. Beyond that, it can be expected that the ICC has not yet reached its full capacity.

Chapter IV

Special Situations or Circumstances in Africa – Can Measures of the ICC in special situations exclude or contradict the general positive influence of ICC to human rights?

1. Introduction

This Chapter seeks to answer the question whether in special circumstances or situations an intervention by the ICC could aggravate the human rights situation. In Chapter III, it was concluded that all utilitarianism elements are generally also applicable within the ICC system and that a general positive influence of the ICC to human rights cannot be seriously challenged. However, additional and exceptional circumstances could (at least in special situations) completely exclude or even contradict these positive effects. There exist two of such developments that recently gained special relevance in Africa. These developments led to massive problems and resentments between the ICC on the one side and the AU and African countries on the other side. Firstly, situations concerning the controversy of 'peace v. justice' in an on-going conflict must be considered. It must be determined, whether and which (negative) consequences a direct intervention of the ICC in an on-going conflict can have. Secondly, because of the specially enhanced need of the participation of the state parties, it seems necessary to determine, whether and which (negative) influence an alleged infringement of the (human) rights of accused persons can have. In particular allegations concerning inequality in prosecution and the right of fair trial in international criminal proceedings must be considered. The 'peace v. justice' controversy as well as the human rights of possible perpetrators, were already of special relevance within the African context and are both still of extreme importance for the future of the ICC in Africa and the world as a whole.

2. 'Peace v. Justice'

The first important point concerns the controversy of 'peace v. justice' and the question whether an early intervention by the ICC in an on-going conflict can exclude the utilitarian effects of the ICC and even aggravate the human rights situation.

In 2008 the AU in the context of the ongoing conflict in Darfur expressed the following:

> '***…its conviction*** *that, in view of the delicate nature of the processes underway in the Sudan, approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a result, may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region*;'.[131]

The 'peace v. justice' discussion was and is still highly controversial, exceptionally complex, very philosophical, and often has vague decisions on what wrong or right can be possible. This controversy exists as a typical phenomenon in ICL and it is unlikely to occur at the national criminal law level.[132] Three of the presented main distinctions between the national and international level,[133] are mostly responsible for it – the often 'outstanding position' of the accused person, the general 'nature of crimes', and the 'lack of a sovereign' in ICL. At the national level individuals, accused of (normal) crimes, (usually) are not influential enough to evade actions of the national criminal law system in practice. In national criminal law relevant crimes normally, does not affect such large numbers of victims, with exceptional consequences on the one side and such large numbers of participating perpetrators on the other side. The practical possibilities in enforcing measures of the criminal law system are not as limited as at the in international level.

The 'peace v. justice' problem often arises in on-going conflicts with continuously occurring gross human rights violation. In these situations, there is a potential for an increased risk that any action of the ICC could provoke new crimes or an on-going negotiation process could be disrupted.[134] But the question on the 'peace v. justice' goes beyond such cases of on-going conflicts. It concerns also the long term future of a country or a region after the factual end of the conflict and above all the question, how the opponent conflict parties can live in future together in peace. The scope of this work does not claim to offer a comprehensive overview on this controversial

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[131] *African Union*, PSC/MIN/3, 22 September 2008.

[132] Even it is not a common problem in national criminal law it is not cogent excluded. For instance in the former German Democratic Republic (GDR) after the revolt in 1953 the government granted a widespread amnesty to reduce the domestic political tensions.

[133] See Chapter II, pp. 13 ff.

[134] *Stigen*, p. 421.

topic. In response to the question, on the possible aggravating influences of measures by the ICC to human rights in special situation, this part focuses on cases of on-going conflicts and considers in particular, cases were accused persons are still in power and the Court undertakes in such situations, direct and on such certain persons, focused measures.

Reference will be made to relevant cases occurred in Africa where the ICC issued arrest warrants against involved persons while peace negotiations were still in process. Several stakeholders argued against the ICC intervention in such situations and pointed out that it hinders or excludes a negotiated solution and does not recognize alternative regional conflict-solution-models. Subsequently, it will be determined whether and which alternative measures in such situations exits, whether the Rome Statute recognizes such alternative measures in general or in an on-going conflict, and which concrete reactions in an on-going conflict are possible.

a) Relevant cases in Africa

Several cases can be found on the African continent where a lot of arguments are brought against the decisions of the ICC for early intervention in on-going conflict situations. These arguments have been made by the accused persons, countries, regional organisations or scholars.[135] The primary arguments brought against the ICC in such context have been that the ICC does not consider 'traditional justice' sufficient and that the Courts inconsiderate and premature actions could escalate the conflict and therefore, hinder the possibility of a negotiated solution. Reference can be made to two typical examples occurred within the last decade. These examples included more substantial actions of the Court namely, the issues of arrest warrants dispatched when an on-going conflict is in process.

In the case of Uganda, the ICC issued arrest warrants against five active leaders of the rebel group Lord's Resistance Army (LRA), which included Josef Kony.[136] Although, the decision received widespread support, [137] several involved mediators,

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[135] *Ping*, Press Statement of AU Commissioner, 29 July 2011; Communique of the 142nd Meeting of the Peace and Security Council, PCS/MIN/Comm (CXL II); *Moy*, Harvard Human Rights Journal, Vol. 19, pp. 269 ff.

[136] *Prosecutor v. Kony*, ICC (PTC II), 08 July 2005.

[137] *UN News Center*, Annan Hails International Criminal Court's Arrest Warrants for Five Ugandan Rebels, 14 October 2005; *Human Rights Watch*, ICC Takes Decisive Step for Justice in Uganda, 14 October 2005.

regional religious and political leaders, argued against the court's decision. The main arguments used against the decision of the ICC were that such issues of arrest warrants undermine the on-going peace efforts and that traditional justice concepts became obsolete because of these early measures of the Court.[138] In taking an ex-post view, the following points seem from a special importance. Firstly, because of the arrest warrants the negotiations were not continued or at least compromised.[139] Secondly, despite comprehensive efforts none of the arrest warrants was enforced up to the present. Thirdly, the LRA committed further terrible crimes after the arrest warrants were issued and the negotiation process was failed.[140]

Another case of significance to this discussion is that of Omar Al-Bashir, the current acting president of Sudan. He came into power in 1989, and since has been accused of massive and widespread human rights violations. Such violations includes: war crimes, crimes against humanity and genocide.[141] These violations began in 2003 and are mostly carried out in the southern province Darfur.[142] On 4 March 2009, the Pre-Trial Chamber I of the ICC issued an arrest warrant against Al-Bashir in concluding that there are reasonable grounds to belief that Mr. Al-Bashir "*is criminal responsible as an indirect perpetrator or an indirect co-perpetrator*" for seven different kinds of crime under the Court's jurisdiction, including war crimes and crimes against humanity.[143] A second arrest warrant, based on reasonable grounds to belief that Mr. Al-Bashir committed genocide, followed on 12 July 2010.[144] The reactions to these two arrest warrants were more extensive than in the above mentioned case of Uganda. In this context the measures of the ICC led to political resentments and an AU's open opposition against the ICC.[145] Even formal decisions of the ICC against state parties were necessary, because they rejected to enforce these arrest warrants against Al-Bashir.[146] The African opposition was overwhelming. Among other arguments against the ICC, such as a lack of

[138] See for a good overview about the situation and the arguments: *Moy*, Harvard Human Rights Journal, Vol. 19, pp. 269 ff.
[139] *Moy*, p. 270.
[140] *Human Rights Watch*, 'Q&A on Joseph Kony and the Lord's Resistance Army'. According Human Rights Watch the LRA killed 2.600 civilians and abducted more than 4.000 people and more than 400.000 people were displaced since 2008.
[141] *Human Rights Watch*, Sudan.
[142] Ibid.
[143] *Prosecutor v. Al-Bashir*, ICC (PTC I), 04 March 2009 (First Arrest Warrant).
[144] *Prosecutor v. Al-Bashir*, ICC (PTC I), 12 July 2010 (Second Arrest Warrant).
[145] *Jean Ping*, Press Statement of AU Commissioner, 29 July 2011.
[146] *Prosecutor v. Al-Bashir*, ICC (PTC I), 12 December 2011 (Malawi).

jurisdiction of the Court,[147] the accusation that the ICC is focusing on prosecuting African leaders[148] or the allegations that the Western World has intentions of 'neo-colonialism',[149] the most used argument was that a peaceful solution of the Sudanese conflict will be more difficult now that such an arrest warrant had been issued.[150] From an ex-post view, the following points are of special importance. Firstly, the issue of the arrest warrants compromised and still is compromising a peaceful solution in the Sudan. The head of the relevant state with a massive influence to the conflict situation was several times excluded from attending meetings held by the AU. More recently, Omar Al-Bashir intended to take part in the UN General Assembly in New York, but for the visa problems with the U.S. authorities connected with the arrest warrants, he had to cancel his plans.[151] Secondly, Al-Bashir is still the acting President of the Sudan. The ICC was unable to enforce the both arrest warrants. Apart from some practical travel restrictions for Al-Bashir, the impact of the issued arrest warrants was of little consequence. Thirdly, the general human right situation within the borders of the Sudan is still critical.[152]

Even both cases may appear, on the first view, very different, they however share important similarities: The ICC undertook real and concrete measures against relevant and powerful accused persons involved in on-going conflicts. This has compromised a negotiated solution. The ICC was not able to enforce its arrest warrants. The accused individuals are still involved in Human Rights violation. It was from the outset questionable whether the ICC is able to enforce the issued arrest warrants.

b) Alternative Solutions in Conflict Situations

In negotiations for a peaceful transforming process, several alternative 'punishments' and traditional justice concepts are thinkable. Throughout the course of history, at least four main groups of alternatives had widespread used around the world.

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[147] *AU Assembly*, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, June/July 2008.
[148] *Jean Ping*, Press Statement of AU Commissioner, 29 July 2011.
[149] *Oko*, p. 355.
[150] *African Union*, *Peace and Security Council (AU)*, Communique of the 142nd Meeting, 21 July 2008, para. 3, 7.
[151] *SudaneseOnline.org*, Sudan's Omar al-Bashir Cancels his Trip to New York for U.N. General Assembly meetings, 26 September 2013.
[152] *Human Rights Watch*, Sudan.

Firstly, the so called 'truth and reconciliation commissions' must be considered. These instruments try to determine the occurred wrong and preserve the knowledge or findings of these wrongs for future generations.[153] The general concept behind this idea is that perpetrators can escape punishment if they confess the committed crimes and help in finding and determining the truth.[154] Such resolutions can be found, first and foremost, in Africa and South America, for instance in South Africa,[155] Sierra Leone[156] or Chile.[157] This solution – at least in this absolute form – seems to be unthinkable in the Western World or under the concept of the Rome Statute, although also in many Western law systems or within the Rome Statute a confession of the perpetrator generally leads to a milder punishment.[158]

Secondly, it must be mentioned a concept that focuses on providing just reparation for the victims with an abandonment of 'common' sanctions of criminal law. It was practiced for instance after the World War II in Germany.[159] Additionally, in Rwanda after the genocide in 1994 many discussions about this possibility arose, although the high number of victims and above all the lack of sufficient funds established a crucial obstacle.[160] It is clear that full reparation in cases of the worst international crimes is from the outset impossible. On the other hand, even a partly reparation could help the victims or their families and should be considered as a general possibility in the interest of victims. Additionally, it requires a special sacrifice from perpetrators, especially in case where such a reparations goes behind the possibilities existing within the common tort law.

Thirdly, amnesties are a widespread practice used in past.[161] Amnesties can be granted in many different ways. They can be granted to certain accused persons or even to all possible perpetrators. Amnesties can also be granted based on a demonstration of a certain behaviour of the perpetrator, such as a confession of the

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[153] *Truth and Reconciliation Commission (South Africa)*, Volume 1, Chapter I, Foreword by Chairperson, 2003.
[154] Reports *Truth and Reconciliation Commission (South Africa)*, 2003.
[155] Ibid.
[156] Report *Truth and Reconciliation Commission (Sierra Leone)*, 2004.
[157] Report *National Commission for Truth and Reconciliation* (Chile), 1991.
[158] See e.g.: para. 34 (1) (17) Criminal Code (Austria); According Article 78 (1) Rome Statute the ICC '*has to take into account such factors as the gravity of the crime and the individual circumstances of the convicted person*'; *Calvo-Goller*, The Trial Proceedings of the International Criminal Code, pp. 296 f.
[159] See for further information: *Pereztegi*, Reparation for Holocaust-Era Human Rights Violation.
[160] *IRIN*, RWANDA: Government to set up compensation fund for genocide victims, 23 March 2000.
[161] See for a good overview: *O'Shea*, pp. 22 f.

wrong-doing. On the other side, they are also thinkable without any confession or sacrifice by the perpetrator. Examples for such a 'general' amnesty can be found, for instance, in the history of Spain after the end of the Franco regime[162] or in the Ugandan Amnesty Act of 2000.[163]

Lastly, a solely practical and political solution must be considered. The exile in a third country became a long tradition in the past and appears relevant today. There are a long list of such cases, for instance the German Kaiser Wilhelm II after World War I in the Netherlands (1918-1941), the former dictator of Uganda Idi Amin in the Kingdom of Saudi Arabia (1979-2003), the ex-dictator of the Central African Republic Jean-Bédel Bokassa in France (1979-1986), the former president of the Philippines Ferdinand Marcos in USA (1986-1990), the ex-dictator of Haiti Jean-Claude Duvalier in France (1986-2011),the former leader of the German Democratic Republic Erich Honecker in Chile (1993-1994), the former president of Peru Alberto Fujimori in Japan (2000-2005), the former president of Liberia Charles Taylor in Nigeria (2003-2006) and more recently, the former dictator of Tunisia in the Kingdom of Saudi Arabia.[164] Not long ago, the granting of exile was taken seriously into consideration in several situations. Such considerations include; Al-Qaddafi (Libya), Saleh (Yemen) or Assad (Syria).[165] It would be hypocritical not to consider this as a practical solution in the interest of the victims in a conflict. One might even argue that such a solution became part of the customary international law, because of its widespread recognition in preventing future human rights violations (*opinio iuris*) and it widespread practice over a long period of time (*consuetudo*).[166]

These examples show that beside the common criminal law measures, other forms of reaction ('justice') to crimes in the context of human rights violation exist. Countries all around the world and with different cultural backgrounds benefited from such concepts in cases that were complex and had widespread violation of human rights.

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[162] *Kritz*, pp. 298 f. He is referring to statements of involved politicians in Spain for instance '*How can we be capable of reconciliation after years of killing each other if we don't have the capacity to forget our past forever?*' or '*amnesty of everybody to everybody*'.

[163] Ugandan Amnesty Act (2000).

[164] *Rahmsdorf*, Diktatoren im Exil – verbannt in den goldenen Käfig, 15 February 2011.

[165] See e.g. in the case of Qaddafi (Libya) *New York Times*, U.S. and Allies Seek a Refuge for Qaddafi, 16 April 2011, in the case of Saleh (Yemen) *U.S. Department of State*, Press conference, 26 January 2012 or in the case of Assad (Syria) the British Prime Minister *David Cameron* in an Interview with TV Al Arabia, 06 November 2012.

[166] See for the requirements of customary law: *Werle*, pp. 46 f.

c) 'Peace v. Justice' within the concept of the Rome Statute

Generally, it is irrefutable that the concept of the Rome Statute gives the ICC, the Prosecutor and the UN Security Council the possibilities of reacting to ongoing negotiations between the conflict parties and to abstain (at least temporarily) from measures against involved persons to avoid negative effects for a peaceful solution of the conflict and a further aggravation of the human rights situation.[167] Such general possibilities are for instance included in Articles, 17 (1), 53 (1) (c), 53 (2) (c) and 16 Rome Statute. The more difficult question is how far these possibilities can reach. It is argued that such possibilities be limited to the 'interest of justice' and only temporarily and not be allowed to evolve into an amnesty.[168] But is a common criminal procedure (at national or international level) really cogent necessary in the 'interest of justice' and 'to avoid impunity'? However, if the Rome Statute from the outset does not recognizes these alternative conflict-solution-models, for a perpetrator in an on-going conflict situation, there will be little incentives to continue to seek a peaceful solution in negotiations. In such cases, the perpetrator will be prosecuted before the ICC after the end of the conflict. Between the conflict parties negotiated solutions (exile, amnesties or truth and reconciliation commissions) could become never relevant, at least not permanently. A perpetrator, who knows from the onset that exclusion of measures by the ICC is only temporarily, will normally have no relevant incentive in searching for a peaceful solution to end the conflict. Because of this, it must be answered at first the questions, whether the Rome Statute recognize the mentioned alternative solutions (truth and reconciliation commissions, exile, amnesties, reparation) in general and, if yes, whether such alternative solutions can lead to a complete and permanent exclusion of common criminal law measures.

aa) System of Complementarity, Article 17 Rome Statute

An important possible (permanent) exception or possibility to recognize such alternative conflict-solution-models can emanate from the system of complementarity.[169] According to Article 17 (1) of the Rome Statute

> '…, *the Court shall determine that a case is inadmissible where:*

[167] *Stigen*, p. 387.
[168] *Stigen*, p. 388.
[169] *Stigen*, pp. 185 ff.

> *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;'*

This exception clause could give the ICC a substantial scope in considering special situations or conflict solution possibilities, such as the granting of asylum in a third state, the respect for the installation and the outcome of national truth and reconciliation commissions or in respecting national amnesties.

In considering the pure wording of this clause, two points seems of a special importance. Firstly, special attention needs to be given to the fact that this provision exclusively, refers to the proceedings (investigation and prosecution), and not to the outcome of these measures.[170] In general, this implies that the Rome Statute in this context does not claim a certain outcome. Especially, it does not require similar sentences like under the Rome Statute or national criminal law. Secondly, even if the word 'prosecute' from a western view and in the context of the Rome Statute could indicate the necessity for a trial before a common criminal court, such an interpretation is by no means definitive. The word 'prosecute' is not restricted to the criminal law itself. It may also be used in more general law context with the meaning of '*to commence and carry out a legal action'*.[171] Additionally, it should be taken into account that the Rome Statute itself presents only a blend of legal traditions.[172] As a result of this, it seems in general, critical to take only one certain view. Instead, all different legal traditions must be considered. Other alternative or traditional 'punishment' methods by national authorities, such as truth and reconciliation commissions, cannot be excluded from the onset. Therefore, even under the Rome Statute, it appears possible that 'justice' can exist and 'impunity' can be avoided, even without a common criminal law procedure and the following normal criminal sentences.

bb) Discretion of the Prosecutor

A further important indication for the general possibility to react to an on-going conflict and to consider alternative conflict solutions can be found within Articles 53

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[170] *Stigen*, pp. 216 f.
[171] *Garner*, Black's Law Dictionary, p. 1237.
[172] *Stigen*, p. 217.

(1) (c) and 53 (2) (c) Rome Statute. According to these rules, the Prosecutor can abstain from investigations or a prosecution, if such an action is not in the '*interest of justice*'. For this decision the Prosecutor has to take into account beside the gravity of the crime or the perpetrator's role within the crime, the interest of the victims.[173] Although this provision contains some additional advices how the term 'justice' has to be understood (the gravity of crime or the interest of victims), however, the vagueness of the criterions leaves a substantial room for interpretation.[174] Therefore, it seems that even in a case of committed high gravity crimes, it is possible to abstain from a prosecution. If in such a case, a prosecution would hinder a peaceful solution and threaten the lives of many people who could be possible victims, the interests of these victims could outweigh the gravity of the already committed crime. As a result of this, it becomes unchallengeable that the Prosecutor can and has to consider human rights violation in an on-going conflict and the consequences of a possible negotiated peace solution.[175]

cc) Discretion of the UN Security Council, Article 16 Rome Statute

Furthermore, the possibilities of the UN Security Council according to Article 16 of the Rome Statute must be considered. Whereas, both the ICC and the Prosecutor cannot abstain limitlessly from common criminal actions against an accused person,[176] the UN Security Council hasn't to consider any normative limits under the Rome Statute itself. Article 16 of the Rome Statute contains no additional requirements and only limited the period of such a deferral to twelve months.[177] The UN Security Council is also not obligated to the general underlying principles of the Rome Statute. Above all, it is not bound by the general objective to avoid impunity or to achieve justice for all. In acting under Article 16 of the Rome Statute, the UN Security Council is only obligated to Chapter VII of the UN Charter to '*maintain or restore peace and security'*, Article 42 UN Charter. The objectives of the Rome Statute such as achieving 'justice' and 'avoiding impunity' play no role for its decision. This means that even the Rome Statute itself and the state parties recognize

[173] *Stigen*, pp. 339 ff.
[174] *Stigen*, pp. 344 f.
[175] *Stigen*, p. 388.
[176] For instance, the Court must exercise its jurisdiction in the case that national authorities have undertaken absolutely no measures (even no alternative or traditional alternatives) against a perpetrator, Article 17 (1) Rome Statute.
[177] The referral can be renewed limitlessly, Article 16 (2) Rome Statute.

that there are cases, where 'justice' not exists and where peace and security or the interest of victims must give preference to the interests of justice – clear and at any price.

In conclusion, the ICC itself, the Prosecutor, and the UN Security Council have sufficient possibilities to react to special situations in an on-going conflict and human rights violations. Especially, they can and have to consider the interests of the affected people. The mentioned cases show that the concepts of 'justice for all' and of 'avoiding impunity' under the Rome Statute are much wider than it seems since the first view. The Rome Statute itself contains several clauses, which allows recognition of alternative conflict-solutions-models and even permanent divergences from the explicit, within the Rome Statute or within the national criminal law systems mentioned punishments and sentences. In the case of an intervention by the UN Security Council under Article 16 of the Rome Statute, it can be waived completely to the objectives of 'justice for all' and of 'avoiding impunity'. On the other hand, these general possibilities cannot mean that the ICC and the Prosecutor have to accept any national alternative conflict solution mandatorily. Instead, both have to examine such efforts seriously and have to weight all the affected interest. Such relevant interests can be for instance, a cultural and historical background in conflict solution of the affected people, regional characteristics, expectable developments of the conflict situation and their consequences, the gravity of the crime and the interests of the (possible) victims.[178] It is clear that such decisions are not easy and that a lot of conditions must be taken into account. However, such difficult considerations are the original task of every court. In fulfilling this obligation and determining the concept of 'justice' within the Rome Statute, the ICC should not take a too narrow view, but rather consider all the different legal traditions of state parties. The Rome Statute itself includes provisions that make such a consideration possible.

Kofi Annan in his address during the Review Conference of the Rome Statute in Kampala 2010 put it straight:[179]

[178] *Review Conference of the Rome Statute*, Resolution RC/Res. 2, 08 June 2010 reaffirmed the special and crucial importance of the interests of victims explicitly.

[179] *Kofi Annan*, Address to the Review Conference of the International Criminal Court, 31 May 2010.

> *'...one thing is clear: the time has passed when we might speak of peace versus justice, or think of them as somehow opposed to each other. Between war and peace must first come something else: reconciliation, forgiveness, a mending of the social fabric. These are the hand-maidens of peace and justice.'*

There is nothing left to be added.

At this point it must be revisited the initial question, whether measures of the ICC in on-going conflict situations can become even counterproductive for generally existing utilitarian effects. The examples aforementioned, the comprehensive discussion about 'peace v. justice' and the reaction of involved stakeholders, clearly shows that an intervention of the ICC in an on-going conflict can hinder a prompt peaceful solution of a conflict and therefore can lead to negative consequences for human rights. On the other hand, it was presented that several normative provisions to address such dangers within the Rome Statute exist. The ICC and the Prosecutor can and have to consider efforts of a perpetrator in finding a peaceful solution and negotiating alternative conflict-solution-models. They have to consider all relevant circumstances and effected interest. Even a permanent and complete exclusion of common criminal sentences, which is probably, the strongest incentive for a relevant powerful perpetrator to end an on-going conflict and make a transition possible, seems possibly under the system of the Rome Statute. If such efforts lead to a quick end of the conflict, prevent massive future human rights violations, and enable conflicting parties to find a solid solution for the future (such as the installation of a truth or reconciliation commission), there is no reason why a prosecution before the ICC should be necessary in the 'interest of justice'. The ICC and the Prosecutor must decide, whether and which concrete measures they consider, in every individual on-going conflict. However, within this decision they have to consider strongly the consequences for the human rights situation and that 'justice' under the Rome Statue can be understood much wider than it seems on the first view. For the two mentioned examples of Josef Kony and Omar al-Bashir, it means that the actions of the Prosecutor and the ICC were inappropriately implemented. In these cases, on the one side, from the outset concrete doubts existed on whether the ICC can enforce the issued arrest. On the other side, concrete concerns were expressed that negotiations will become much more difficult. If it is from the onset, likely that measures taken by the Court cannot be enforced in practice, it offers little or no benefit, to take such

measures against a concrete person and risk ending the much needed negotiations and any possibility of stopping an on-going conflict.

3. (Human) Rights of the Perpetrators

The recognition of the (human) rights of the perpetrators can become another crucial point for the effectiveness of the ICC in preventing further human rights violations. From the first viewpoint, this strong connection between this point and the effectiveness of the ICL system seams not obvious. However, it must be restated that the ICC, in fulfilling its obligations in the different contexts, is strongly dependent on the (sometimes voluntary) participation of the state parties and other involved stakeholders. Therefore, the more people, communities or countries don't accept the work of the ICC as justified and fair, the more difficult work of the Court will become.

Two points are of a special relevance and both recently, became important in the context of the relationship between the ICC and Africa. Firstly, the general principle of equality must be considered. Could it be a defence in a criminal procedure, if the ICC handles similar cases unequally? Can an accused individual argue that the Court does not prosecute a person in an equivalent case or situation? Secondly, in this context, the general principle or right to a fair trial must be taken into account. The ICL faces regularly, large, complex and often vast situations that must be solved. The distinction between victims and perpetrators is most times difficult to achieve and the trial takes place in most cases, thousands of miles from the place where the certain crimes occurred. As a consequence of these circumstances, a conflicting party, which is still in power during the investigation could influence and manipulate evidences to pursue its own political interests.

a) Equality in Prosecution of the ICC

Since the French Revolution in 1789, the general principle of equality before the law found its way to most countries around the world. Today, equality is a grounding principle in most human rights documents. Such provisions are found in Article 14 of the European Convention of Human Rights (ECHR), in Article 3 of the African

Charter on Human and People's Rights (ACHPR), and in Article II of the American Declaration of the Right and Duties of Man (ADRDM). Additionally, most national constitutions include this right as a grounding principle of their state systems.[180]

During the last decade, criticism from African countries concerning the equality of the prosecution of the ICC increased permanently, and reached a new high during the AU summit 2013. It appears that now, a situation emerged where a whole continent unanimously, rejected the decisions and prosecutions of the Court as unequal.

In 2011 Jean Ping, Commissioner of the African Union, pointed out: [181]

> *'The ICC's active cases all target crimes against humanity committed in the African states of Sudan, Democratic Republic of Congo, Central African Republic, Uganda and Kenya. Why not Argentina, why not Myanmar ... why not Iraq?'*

An examination of this position requires that the following points to be clarified. Firstly, it must be asked whether such an argument can be recognized as a defence in criminal law and especially under the system of the Rome Statute. Secondly, the mentioned examples must be examined for verification they can really prove an inequality in the prosecution.

aa) Inequality in Prosecution as a Defence under the Rome Statute?

The first question to answer is, whether an inequality in prosecution by the ICC can be used generally as a legal defence within the system of the Rome Statute. Assuming that the ICC prosecutes or trials only one of two identical cases and without any comprehensible reason given, the following question can be posed. Can the prosecuted perpetrator arguing that this prosecution is violating the principle of equality before the law and in this way avoid a conviction?

The Rome Statute itself contains no clear indication for such a legal defence. The word 'equal' and 'equality' appears only in few and different contexts within the Rome Statute, like in Articles 27, 54 and 67 Rome Statute. However, it seems possible to resort to the more fundamental principles and goals of the Rome Statute to answer this question. On the one hand, it could be argued that the achievement of

[180] See for instance: Article 3 German Constitution, Section 9 Constitution of the Republic of South Africa, Article 4 Constitution of the People's Republic of China.

[181] *Ping*, Press Conference of the African Union, 29 January 2011.

one of the main goals of the Rome Statute, namely 'to achieve justice' would be foreclosed. It seems difficult to speak about 'justice', if only selected perpetrators of those that committed a similar crime will be prosecuted and convicted. In recognizing this defence, the ICC would be forced to handle same cases in the same way. On the other hand, this would lead to a situation whereby, all prosecuted perpetrators could use such a defence, if the ICC does not prosecute one perpetrator in a similar case, without any comprehensible reason given. In such a case all perpetrators would stay unpunished, even all of them committed the certain international crime. This would contradict another main goal of the Rome Statute – to end impunity.

Therefore, the answer must be sought between these two views. The Bundesverfassungsgericht (German Constitutional Court) has principally denied such a defence in the national criminal law in Germany.[182] Even so, it has clarified that such defence should be possible in exceptional cases of a systematic prosecution of only some perpetrators without any reasonable grounds.[183] Such a distinct consideration also seems appropriate within the Rome Statute. The two concurrent goals (to achieve justice and to avoid impunity) should be appropriate balanced. Therefore, the equality argument must be denied as defence in general. Even when an accused individual can find a certain similar case, which the ICC failed to prosecute, the goal of ending impunity must take priority. However, if the ICC prosecutes systematically, only certain cases of similar situations without any reasonable grounds, such a defence based on the principle of equality must be possible. Such a systematic 'targeting' without comprehensible reasons cannot be (longer) in the interest of 'justice'.

bb) Examples of the AU

If one takes this result into account and considers the certain and concrete accusations by the African Union, it becomes clear that the argument of equality cannot be used against an on-going investigation and prosecutions of the African cases by the ICC.

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[182] *Bundesverfassungsgericht*, 17 March 1995, BVerfGE 9, 213 (223); *Bundesverfassungsgericht* , 17 January 1979, BVerfGE 50, 142 (166).

[183] *Bundesverfassungsgericht*, 27 June 1991, BVerfGE 84, 239 (271 ff.); *Osterloh*, Art. 3 para. 49.

Firstly, the fact that most investigation and prosecutions of the ICC are focused on situations in Africa can deliver no evidence for an ICC's arbitrary prosecution of African situations. Such a 'targeting-situation' would be normal, if relevant crimes only occurred in treaty-bound states in Africa. In this context, it should be repeated that at one side a large number of African countries have signed and ratified the Rome Statute and that at the other side a large number and powerful nations or states in conflict regions outside Africa are still not state-parties to the Rome Statute. For instance, if on the territory of these non-state-parties, international crimes occur or citizen of these countries commit crimes on the territory of a non-state-party, a jurisdiction of the ICC can only be established in the exceptional case of a referral by the UN Security Council acting under Chapter VII of the UN Charter.

Secondly, in several by the AU mentioned examples, the concrete actions were not grounded on an original decision of the ICC, but rather on a referral by the affected country (Uganda)[184] or a referral by the UN Security Council (Sudan).[185] Additionally, several examples by the AU for an ICC's failure to act in cases outside Africa are from the outset inappropriate to prove an unequal and arbitrary prosecution by the ICC. Myanmar and the Iraq are not state-parties to the Rome Statute.[186] Additionally, the USA whose troops allegedly committed human rights violations in Iraq, are not a state-party of the Rome statute.[187] This means that the ICC has principally, no jurisdiction about these cases. Such a jurisdiction of the Court could be established only through a referral by the UN Security Council, Article 13 (a) Rome Statute. If the UN Security Council refers one case to the Prosecutor and does not do this in another similar case, the ICC cannot be accused of an unequal prosecution. In this case, the referral by the UN Security Council is the main and obligatory reason for a prosecution, not an (unequal) decision by the ICC or the Prosecutor. Even the situation in Argentina, which is now a state party of the Rome Statute,[188] cannot be used as an example for an unequal prosecution. The so popularly known 'Dirty War' in Argentina with widespread and massive human rights violations occurred between 1976 and 1983.[189] According Article 11 (1) Rome

[184] *ICC*, Press Release, 29 January 2004.
[185] UN Security Council, S/RES/1593 (2005), 31 March 2005.
[186] *ICC*, The State Parties of the Rome Statute.
[187] *ICC*, Ibid.
[188] *ICC*, Ibid.
[189] *Human Rights Watch*, Human Rights in Argentina.

Statute the Court *'has jurisdiction only with respect to crimes committed after the entry into force of this Statute.'* As a result of this, the ICC has from the onset, no jurisdiction and possibility to start investigations or prosecutions in cases occurred during this violent era in Argentina.

In conclusion, it must be said that an unequal prosecution of cases by the ICC generally, cannot establish a legal defence for a prosecuted individual. Such a formal defence, based on the principle of equality, can come into consideration only if the ICC prosecutes systematically only certain of similar cases without any reasonable grounds. The AU mentioned cases cannot be anywhere near supply evidences for such a systematically unequal prosecution.

b) Fair Trial

The principle of a fair trial can become an additional influence to the acceptance of the work done by the Court and therefore help or hinder ICC in preventing future human rights violations. If the people, communities or countries don't accept the work of the ICC as justified and fair, it will become more difficult for the Court to enforce or to communicate its utilitarian elements.

Difficulties with the principle of fair trial can occur within the work of the ICC in many different ways. The Rome Statute, as a blend of different legal traditions, includes only a minimum of fair trial standards, e.g. Articles 55 (2), 66, 67 Rome Statute. Many national criminal law systems use higher fair trial standards that are not applicable within an ICC trial. These lowered requirements were for instance one main argument by the USA in opposing the Rome Statute and the ICC.[190] In this context it was argued that the Rome Statute does not recognize a jury-trial, a right to a speedy or public trial, and a right to confront and cross-examine witnesses.[191]

This section focuses on a special aspect within the many different fair trial problems, which became relevant recently in two African situations. It was argued that African conflict parties in the past tried to use the ICC to pursue their own political interest and to combat political opponents.[192] For this they took advantage of the ICC's

[190] *Casey*, p. 865.
[191] *Casey*, ibid.
[192] *Nouwen / Werner*, p. 942.

particular difficulties in solving a special situation.[193] In cases of Uganda and Sudan, it was well advocated that manipulations and canalizations of evidences were possible for the government, as well as for rebels, and that such manipulative treatments can lead to (unintended) partial actions of the ICC against one conflict party.[194]

In looking at the special situation of the ICC in comparison to the national criminal law, it becomes clear that such manipulations or canalizations of evidences by a conflict party are possible. The ICC faces several additional problems to determine the truth.[195] Such conflicts are usually and extremely complex. The trial takes place regularly far away from the place where the crimes occurred. The access to evidences and testimonies is more limited and depends strongly on the goodwill of the actual government in the country or area. Sometimes it is even difficult to distinguish between perpetrators and victims, soldiers and terrorists, and policeman and criminals.[196] It can be stated that the ICC and the Prosecutor in this context have '*no more powers than any tourist in a foreign State*'.[197]

In summary, it becomes obvious that the ICC is in an extremely difficult situation. It is clear that also national criminal courts have to verify the validity of the evidences. However, the ICC is in this context much more imperilled by such manipulations. If it wants to avoid an infringement of the fair trial principle, it must be sure that there is no manipulation or canalization of evidences. It must be carefully examine any indications for such manipulations or political intentions of the conflict parties. If it cannot definitely exclude such manipulation or canalization, it must be very careful to take measures exclusively against one of the conflict party. Otherwise, the right of a fair trial could be infringed, the acceptances of measures by the Court would be lowered, and finally the utilitarian effects become lower.

4. Conclusion

In this Chapter it was shown that in ICL and above all, in Africa, several special problems ('peace v. justice' / rights of the accused persons) can arise and diminish

[193] *Nouwen / Werner*, ibid.
[194] *Nouwen / Werner*, 964.
[195] *Stigen*, pp. 21 ff.
[196] *Nouwen / Werner*, 962.
[197] *Swart / Sluiter*, p. 115.

the utilitarian effects of the ICC. In the cases of on-going conflicts, it was demonstrated that an intervention of the Court in such a situation can without a doubt, hinder further negotiations and a peaceful solution of the conflict. However, it was possible to find solutions within the Rome Statute, to react sufficiently, to these cases, recognize the interests of the (further) victims adequately, and also take alternative conflict solutions into account. Furthermore, it was shown that the rights of the accused persons can play a special role for the ability of the ICC in preventing future human rights violations and that these must be seriously taken into account in this context. If the ICC does not prosecute similar cases equally or does not recognize procedural rights of accused persons sufficiently, the ICC and its decisions can both be rejected. Because the ICC is strongly dependent from the participation of the whole international community, a lack of acceptance would directly decrease the utilitarian effects and weaken the ability of the ICC to prevent future human rights violations. The developments in Africa have clearly shown this danger exists. If certain countries or state parties criticise the work of the ICC or deny a co-operation with the Court, it will clearly have a negative influence on the utilitarian effects of the ICC. In the case of Africa the danger seems even higher. If a whole continent and a whole regional organisation seriously refuse to co-operate with the ICC, it could challenge even the existence of the ICC and counter its utilitarian effects completely.

Conclusion

Within this work it was possible to show that the potential of the ICC to prevent future human rights violations in general cannot be challenged. The fact that actually no reliable empirical data (researches or statistics) exist, which can deliver clear and definitive evidences that the work of the ICC has prevented human rights violation, is not an obstacle to this outcome.

In Chapter I, it was shown that the general ability of national criminal law in preventing future crimes cannot be seriously contested. There are several utilitarian effects that emanated from the common national criminal law systems: deterrence of potential perpetrators, just incapacitation of convicted perpetrators, transforming elements, and restorative or condemnation elements. Although, strong critics concerning some of these effects still exist, and national statistics and researches about these effects have doubtlessly weak points, when one considers the whole entirety of the different utilitarianism effects, the different points of criticism cannot be upheld. If one utilitarianism effect fails in a special case, often other effects become relevant. Furthermore, in modern societies, criminal law is only one important pillar to prevent future crimes. Other measures beyond the criminal law, such as enlightenment and education, exist. They are equally important in preventing future crimes. However, it must be clarified that all these utilitarian effects and additional measures will be unable to completely prevent future crimes. The opposite view would be illusorily – at least if considering a foreseeable future.

Within Chapter II and III, it was clarified that notwithstanding the large and crucial differences between the national and the international level of criminal law, the common utilitarian effects of domestic punishment can also be transferred to ICL. Therefore the role of the ICC within the international human right protection system cannot seriously be denied, even though no resort to sufficient empirical data (researches and statistics) to prove such an importance of the Court is possible. The main distinctions that exist between the two levels of criminal law, such as the different ‘nature of the relevant crimes’, the ‘lack of a sovereign’, the lack of a Court’s own executive power under the Rome Statute or the existence of the

‘outstanding position of perpetrators’ in international crime situations can perhaps influence or weaken the effectiveness of certain utilitarian effects at the international level. However, every one of these effects has without a doubt, a justification in ICL an especially, under the Rome Statute. The most important reason for these findings was surely the establishment of the first permanent international court. With this milestone, a prosecution and conviction of persons accused of committing international crimes, is no longer unlikely. Even in cases with no original treaty-based jurisdiction, the ‘danger’ for perpetrators to become prosecuted is much higher now. In such cases today, ‘only’ a referral of the UN Security Council to the ICC is necessary, and there is no need for a completely new establishment of an ad-hoc tribunal. Additionally, it must be taken into account that the ICC has not reached its full capacity, that the Rome Statute was designed from the onset as only one pillar within the human rights protection system, and that the positive consequences for human rights can be enormous if only one in hundreds potential perpetrators does not commit international crimes because of the existence of the ICC. In light of these points, a generally outstanding importance of the Rome Statute in preventing future human rights violations cannot be seriously challenged.

Chapter IV has considered two special African situations and it was shown that the work of the Court could become counterproductive to the protection of human rights. In an on-going conflict with widespread human rights violations, measures taken by the Court can be the crucial reason for the failure of a peaceful solution and an immediate cessation of the violence. In such cases, the ICC is challenged to weight the arguments from the ‘peace v. justice’ discussion, accurately. The Rome Statute itself gives all stakeholders a wide discretion to reflect upon all the conflicting interests, and especially, the human right situation at hand. Within the Rome Statute, as a blend of different national and/or regional legal systems and traditions, regularly more room for interpretation of the provisions exist. For instance, an interpretation of ‘justice’ can be very different, depending on whether one considers this point from a western or an African perspective. Therefore, it is the usual task of the Court to interpret the normative law of the Rome Statute by taking all relevant circumstances into account and weighting out all the different interests. It seems, in general, possible to recognize alternative conflict-solution-models and to take regional and cultural characteristics into account. Even to refrain permanently from imposing the within the Rome Statute explicitly mentioned criminal sentences seems possible –

especially, if thereby widespread future human rights violations in on-going conflicts can be prevented. Additionally, it was shown that an alleged infringement of the rights of the accused persons by the ICC can have a crucial influence on its ability to prevent future human rights and can even challenge the ICC's very existence as a whole. The system of the Rome Statute depends in many ways on a strong support of the state parties and other involved actors. So, if such needed support is absent because the ICC is accused of acting in a discriminatory manner or violating important procedural rights of the accused persons, the proper functioning of the Court becomes very difficult. However, when a whole continent opposes the ICC then its very existence in general, could be challenged, regardless of whether the arguments used can convince in a legal view or not.

Although this thesis has shown that the ICC already today is playing an important role in the international human rights protection system, there is still room for improvement. The demonstrated shortcomings and problems indicate the most necessary enhancements:

1. The most important point seems to be the necessity to extend the jurisdiction of the ICC. A large number of countries in the world, and especially, big and powerful states that regularly involved in violent conflicts are not state party of the Rome Statute. Of course, it is not possible to force these countries to ratify the treaty. However, a strong promotion of the ideas of the Rome Statute and take the concerns of the non-state-parties seriously would significantly facilitate an extension of the jurisdiction of the ICC.

2. A similar crucial extension of prosecutions of international crimes and therefore, an increase of the utilitarian effects could be reached through a stronger implementation of the international criminal law in national criminal law systems. The Rome Statute itself provides for the prosecution of only the worst cases and the worst perpetrators. Minor perpetrators have to be prosecuted by national criminal law systems. In the case of committed international core crimes international customary criminal provisions and universal jurisdiction exist. As a result, national criminal courts in all countries, regardless of the place where the crime was committed and which nationality the perpetrator has, have jurisdiction about the crime and can normally apply customary ICL. However, the normative

and especially the practical implementation of such jurisdiction in national law systems seem of a special importance for a consistent and equal prosecution of international crimes.

3. The concept of 'justice' within the Rome Statute has to be understood in a much broader context than solely, to punish the perpetrators with the common criminal sentences (imprisonment). The Rome Statute includes sufficient room for such a wider interpretation. Any other view would from the onset lead to intractable conflicts in cases where nearly the whole population of a country became either perpetrators or victims. In such very complex situations alternative conflict-solution-models could be the only possible way to resolve the conflict. So, why should the ICC not take such encouraging alternative measures into account?

4. The ICC should consider regional context more seriously. The Rome Statute represents only a blend of different legal systems and traditions. The crucial differences between these legal traditions must be taken into account. Several provisions within the statute grant the Court sufficient room for differentiation and special consideration. In this context the Court should be careful not to show rigid preference of any these legal traditions to others.

5. Expectation about the ICC should be not an unrealistically high. It should be clarified that it will be not possible to prevent all (international) crimes and human rights violations in future. Additionally, the Rome Statute can be only one pillar in reaching this goal. Therefore, it seems from the onset wrong to qualify and promote the ICC as the 'ultimate' instrument in preventing future human rights violations. In the case of occurring massive human rights violation or international crimes in the future, it would be the perfect argument for opponents to argue against a justification of the Court.

6. In the case of on-going conflicts, the ICC and the Prosecutor must seriously consider the consequences of early and against certain persons directed measures, especially, those ones that can become a direct influence to the human rights situation. If it appears likely that the by the ICC intended measures cannot be enforced in practice and such intended measures will become a negative influence to negotiations between the conflict parties and further human rights

violations threatens, than there can be generally no justification for such measures.

7. The ICC has to consider stringently, the equality aspects in investigation and prosecution. Even when an inequality in prosecution cannot be used as a legal defence in general, the actual opposition of the AU shows clearly, possible crucial consequences, if state parties or a whole regional organisation just feel unjustly threated.

8. The Court must seriously recognize procedural rights of the accused persons. It must especially, avoid being used as an instrument to combat political opponents and to settle political scores. The negative consequences could be the same like in a case of unequal prosecution.

So, if the ICC can consider these points, it seems that the actual ability of the Court in preventing human rights violation can be maintained and in the future, improved.

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